No. 05-88

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In The

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1a to 198a

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does Rule 23 require plaintiffs to "convince the court" of the existence of a pattern or practice of discrimination and to "establish" discrimination before a class may be certified, and can the court reject admissible statistical reports in that analysis? Should the denial of class certification in this case be reversed?

II. Is class certification in a Title VII action barred if plaintiffs seek only equitable relief? Should the denial of Petitioners' alternative request for certification of an equitable relief-only class in this case be reversed?

III. What is required to characterize a case as a mixed-motive case at summary judgment for purposes of the application of the burden-shifting analysis of *Desert Palace v. Costa*, 539 U.S. 90 (2003), and if this case is not a mixed-motive case, does *Desert Palace* apply beyond mixed-motive cases? Should the grant of summary judgment in this case be reversed?

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Cornelius Cooper, Michael Edwards, Charcella Green, Patricia Harris, Sarah Jean Harris, Irene McCullers and Carolyn Wilson were plaintiffs and appellants in the proceedings below.

Respondents Southern Company, Southern Company Services, Inc., Southern Company Energy Solutions, Inc. and Georgia Power Company, Inc. were defendants and appellees below.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners state as follows:

Southern Company is a publicly traded Delaware corporation that is domesticated under the laws of Georgia and that maintains its corporate headquarters in Atlanta, Georgia. Southern Company Services, Inc., Southern Company Energy Solutions, Inc., and Georgia Power Company, Inc. are subsidiaries of Southern Company.

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PETITION FOR A WRIT OF CERTIORARI

This petition presents important questions about the requirements for obtaining certification of a class raising claims of systemic discrimination under Title VII and Section 1981. The Eleventh Circuit held that plaintiffs must prove the existence of a pattern or practice of discrimination to obtain certification of such a class. The Eleventh Circuit's class certification ruling ignores the plain language of Rule 23, departs from the precedent of this Court, and conflicts with decisions of the Second and Ninth Circuits.

Petitioners, seven black employees of Respondent Southern Company and its subsidiaries, sought to challenge, on behalf of a class of about 2,400, the racially disparate treatment and impact caused by Respondents' common policies for awarding pay and promotions. Petitioners submitted the following evidence in support of their request for class certification:

(1) admissible statistical regression analyses by a qualified expert finding statistically significant deviations in pay and promotions between similarly-situated whites and blacks;

(2) Respondents' own internal reports finding, *inter alia*, that whites are paid, on average, 20.7% more than blacks and that blacks receive statistically significantly fewer promotions;

(3) 111 affidavits in which prospective class members recounted specific incidents of discriminatory conduct;

(4) audits from the U.S. Department of Labor finding numerous instances of discrimination against black employees in the areas of pay and promotions; and

(5) evidence of explicit racial hostility promulgated and tolerated by management, including numerous hangman's nooses, epithets, racist cartoons and KKK references, to bring "the cold numbers convincingly to life." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

The district court found that Respondents maintain common personnel policies that apply to pay and promotion decisions affecting a sufficiently numerous class of adequately represented black employees, but denied class certification because Petitioners had not "*convinced*" the court that the proffered evidence "*established*" a pattern or practice of discrimination. The district court subsequently granted summary judgment against each Petitioner's claims of systemic and individual discrimination. The Eleventh Circuit affirmed those rulings in every respect.

The evidence Petitioners offered was more than sufficient to raise common questions and to demonstrate the typicality of Petitioners' claims, *i.e.*, to satisfy Petitioners' burden under Rule 23. Yet, the district court and the Eleventh Circuit expressly denied class certification on the basis of their views of the substantive merits of the evidence, thus imposing a new and unjustified requirement that plaintiffs *prove* their case to a court to obtain class certification.

Even if Petitioners had overcome the Eleventh Circuit's erroneous evidentiary hurdle, the Court further imposed a "Catch 22" that effectively precludes certification of *any* class claims of intentional discrimination. The Court ruled, on the one hand, that if plaintiffs seek damages, certification is barred because individual issues relating thereto predominate. But, on the other hand, if plaintiffs do not seek damages, they are inadequate for failing to raise all of the class' claims.

The Eleventh Circuit's affirmance occurred over the vehement opposition of the United States Equal Employment Opportunity Commission ("EEOC"), which appeared both by brief and in oral argument to urge reversal of the district court's class certification and summary judgment holdings. The brief of the United States EEOC is included in the Appendix at Pet. App. 379a-412a.

The Eleventh Circuit has erected procedural and evidentiary hurdles that effectively foreclose the ability of employees to collectively challenge common policies or

practices that result in a pattern or practice of discrimination or have a disparate impact. Because the rulings in this case seriously threaten to curtail the promise of equal employment opportunity Title VII and Section 1981 were meant to secure, certiorari should be granted.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a-90a) is reported at 390 F.3d 695. The district court opinions granting motions for summary judgment are reported at 260 F. Supp. 2d 1352 (Pet. App. 231a-262a); 260 F. Supp. 2d 1258 (Pet. App. 164a-198a); 260 F. Supp. 2d 1317 (Pet. App. 90a-117a); 260 F. Supp. 2d 1295 (Pet. App. 263a-280a); 260 F. Supp. 2d 1278 (Pet. App. 118a-144a); 260 F. Supp. 2d 1305 (Pet. App. 145a-163a); 260 F. Supp. 2d 1334 (Pet. App. 199a-230a); and 213 F.R.D. 683 (Pet. App. 281a-292a). The district court opinion denying class certification is reported at 205 F.R.D. 596 (Pet. App. 293a-377a).

JURISDICTION

The Eleventh Circuit entered its judgment on November 10, 2004. The Eleventh Circuit denied a timely motion for reconsideration on April 15, 2005. (Pet. App. 378a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

The text of the relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix. Pet. App. 413a.

STATEMENT OF THE CASE

The Southern Company and several of its subsidiaries (collectively "SoCo") utilize a common human resources system and operate under common pay and promotion policies, which apply to all members of the proposed class.

See R141 at 10-17 (discussing common policies and practices and discretion within each). Although SoCo has multiple facilities, the district court found that the policies and practices Petitioners challenge apply Southern Company-wide: "**Defendants utilize common compensation and promotions policies promulgated and administered by Defendant SCS.**" Pet. App. 300a (emphasis added); *id.* at Pet. App. 298a ("Defendant [SCS] has contracted with TSC and each of its subsidiaries to furnish human resources and EEO functions for them."). Petitioners allege, *inter alia*, that SoCo's common pay and promotion policies, which give managers unfettered discretion to make subjective, non-job-related decisions, foster a pattern and practice of discrimination or have a disparate impact on black employees, in violation of Title VII and 42 U.S.C. § 1981. Petitioners' allegations pertain to discrimination in pay and promotion only.

Petitioners submitted overwhelming common proof of a pattern or practice of discrimination. First, SoCo's own former head of Human Resources and EEO testified:

> During my tenure at Southern Company, the company was aware of significant **system-wide** problems in its affirmative action and diversity policies and practices. For example, in my position, **I received reports showing there were statistically significant differences between the promotion rates of African-Americans relative to Caucasians.**

R141, Ex. A ¶ 6D (emphasis added).

Second, SoCo's own internal analyses found that **blacks receive** (1) **on average, 20.7% lower salaries than whites**; (2) on average, 4.5% lower annual incentives than whites; and (3) statistically significantly fewer promotions than whites. R119, Exs. 12 (at 237, 240-41), 29, 57, 86.

Third, a Department of Labor audit concluded that at SoCo "underrepresentation of minorities . . . exists in several key areas," and that "[GPC] failed to ensure that

positions held by minorities . . . are at salary levels comparable to similar positions held by non-minority . . . peers." *Id.*, Ex. 14 at I7537, I7534.

Fourth, Petitioners submitted class-wide evidence of **statistically significant disparities** in the pay and promotion of black employees versus similarly qualified white employees. R119, Ex. 1. Petitioners' expert, Dr. Janice Madden of the University of Pennsylvania,[1] ran multiple regression analyses that controlled for numerous variables and found:

> **African American employees . . . are significantly less likely to be selected for promotion** between December 31, 1996 and December 11, 1999. . . . African-American employees are expected to have had 14.1% more promotions than they actually received, were a racially neutral selection process used to select employees. . . . The probability that a racially neutral promotion process could have generated this racial disparity is less than 3 in 100 thousand (.00002492)." *Id.*, Ex. 1 at 2 & Table 1 (emphasis added).

Significantly, Dr. Madden found that controlling for experience and education "increases the magnitude of the estimated promotional disadvantage of African-Americans," meaning that the shortfall of 14.1% is "likely an underestimate of the true shortfall." *Id.*, Ex. 1 at 14-15 & Tables 3-4.

Dr. Madden found even greater disparities in pay: "[T]he awarding of compensation at Southern is not

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[1] Dr. Madden has been used as a statistical expert in discrimination matters by, *inter alia*, the United States (*United States v. Pasadena Indep. Sch. Dist.*, No. H-83-5107, 1987 U.S. Dist. LEXIS 16912 (S.D. Tex. Apr. 18, 1987) (Madden's statistical analysis established a *prima facie* case for plaintiff United States)) and the EEOC (*EEOC v. Venator Group*, 99 Civ. 4758, 2002 U.S. Dist. LEXIS 1724 (S.D. N.Y. Feb. 5, 2002) (denying *Daubert* motion as to Madden's analysis for plaintiff EEOC)).

racially neutral. For each year from 1995 through 1999, **African Americans receive significantly lower levels of compensation ... than do Caucasian employees" even when comparing employees with the same education, tenure at the company and job grade.** "The average percentage wage differentials by race were even greater when the effects of the racially-tainted salary grades are removed," ranging from 18.79% to 20.33%. "[T]he wage differences by race for each year massively exceeds the two standard deviations required to dismiss chance as the reason for the race differences." *Id.*, Ex. 1 at 2-4 & Tables 5-9 (emphasis added). "The probability that a racially neutral process could have generated the[] differentials is less than .0000000000026 or 26 in 10,000,000,000,000." *Id.*, Ex. 1 at 20.

Fifth, Petitioners submitted evidence of racial animus that the United States EEOC described as follows:

> [P]hotographs and documentary proof, generated in 2000, of at least 13 nooses displayed in eight GPC plants, some over a period of years; a compendium of racially offensive "jokes" posted on bulletin boards in company facilities; a "KKK cartoon" placed in employee mailboxes; a photograph of a hat with a racial epithet worn in the workplace; and testimonial accounts by numerous black employees of racially offensive slurs, "jokes," epithets, and harassment at work. Finally, 111 prospective class members signed affidavits recounting instances of alleged racial discrimination during their employment at SoCo. Pet. App. 394a.

Petitioners sought class certification on several *alternative* bases, including certification of claims solely for injunctive relief under Rule 23(b)(2), certification of claims for injunctive relief and backpay under (b)(2), and certification of claims for injunctive relief, backpay and damages under (b)(2) and/or (b)(3). R116 at 45; R141 at 24.

Holding that the evidence did not "convince the court" that a pattern and practice of discrimination existed, the district court denied Petitioners' Motion for Class Certification. The district court also granted summary judgment on every individual claim asserted by the Petitioners, holding, *inter alia*, that in the absence of "direct" evidence of discrimination, Petitioners had the burden to disprove each and every non-discriminatory motive proffered by Respondents. The Eleventh Circuit affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I. The Opinion of the Eleventh Circuit disregards the holdings of this Court in *Eisen* and *Bazemore* and conflicts with other Circuit Courts

Requiring plaintiffs "to convince the Court" of the merits of their case at the class certification stage flatly contradicts Rule 23 and the holding of this Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974): "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* That is precisely the "authority" the district court and Eleventh Circuit exercised in this case.

Weighing the relative merits of competing expert reports at the class certification stage and holding that Rule 23 is not satisfied based on a finding that an admissible, methodologically valid regression analysis does not "convince the Court" that discrimination exists violates *Bazemore v. Friday*, 478 U.S. 385 (1986), as well as *Eisen*. This violation is particularly clear on this record, where (a) Petitioners' expert report accounted for every variable described in *Bazemore* and more; (b) Respondents submitted no evidence that including the "omitted" variables would eliminate the statistically significant disparities found in Petitioners' expert report; (c) the report in fact included most of the additional variables the district court and the panel claimed were omitted; (d) other "omitted"

variables were subjective factors as to which no statistics were maintained; and, (e) the district court denied Petitioners' request for an evidentiary hearing on class certification. It was for a jury, not the court, to resolve the common questions posed by Petitioners' evidence.

1. *Eisen* precludes a requirement that plaintiffs' evidence "convince the court" that discrimination exists at the class certification stage

The district court here expressly denied class certification because Petitioners' evidence did not "convince the Court" that Respondents had engaged in a pattern and practice of race discrimination, *i.e.*, that Petitioners had proved their case. Pet. App. 366a ("Even when Plaintiffs' pattern and practice evidence is considered as a whole, however, it is not enough to *convince the Court* that race discrimination is Defendants' 'standard operating procedure' as defined by *Teamsters*.") (emphasis added). The district court expressly determined whether Petitioners had demonstrated commonality based on its perception of the strength of Petitioners' evidence relative to its perception of the strength of Respondents' evidence: "Plaintiffs assert that the conclusions of Dr. Madden prove that Defendants' collective policies have adversely impacted African-American employees of Defendants as to promotions and compensation. Therefore, *it is important to focus on the* ***relative strength and quality of that evidence*** *to determine if it is strong enough to provide the element of commonality* needed for class certification." Pet. App. 327a (emphasis added). The court held that "the extent of adverse outcome is not *proven with convincing force* by the expert testimony. . . . " Pet. App. 367a (emphasis added).

The district court cited no authority that permits a court to rule on the strength of a plaintiff's evidence in ruling on a motion for class certification, nor any case requiring plaintiffs to *prove* the existence of discrimination to have a class certified.

Nevertheless, the Eleventh Circuit expressly endorsed the district court's approach of deciding the issue of class certification by deciding the ***merits*** issue of whether plaintiffs' evidence ***proves*** a pattern and practice of discrimination. The Opinion states, "[t]hus, it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it ***established*** the discrimination of which plaintiffs complained." Pet App. 30a (emphasis added).[2] The Eleventh Circuit went on to add "we are persuaded that the district court did not err in *any* of its determinations, and, accordingly, affirm its judgments in *all* respects." (emphasis added). Like the district court, the panel cites no authority for the proposition that a court may decide a motion for class certification by deciding whether the proffered evidence proves the plaintiffs' case. That proposition conflicts with *Eisen* and its progeny and creates a circuit split.

a. The Eleventh Circuit has decided this important federal question in a way that conflicts with *Eisen*

As noted above, this Court's opinion in *Eisen* prohibits a district court from denying class certification based on a ***merits*** ruling that the evidence does not prove the plaintiff's case. The Opinion attempts to distinguish *Eisen* by stating, "[t]hat a trial court [makes an informed assessment of the parties' evidence] does not mean that it has erroneously 'reached the merits' of the litigation." Pet. App. 23a. That attempted distinction ignores the fact that the district court did not merely assess the existence or admissibility of the evidence here; it expressly ***ruled on the merits*** of the evidence. There is no precedent allowing

[2] Pet. App. 37a ("the district court did not abuse its discretion in determining that the statistical and anecdotal evidence submitted by the plaintiffs did not ***establish*** pattern and practice discrimination common to the class or a common disparate impact") (emphasis added).

a district court to do such a thing; to the contrary, *Eisen* forbids it.

b. The Eleventh Circuit has decided this important federal question in a way that conflicts with other circuits

Other circuits interpret *Eisen* differently than the Eleventh Circuit. For example, the Second Circuit has held that "[t]hough [defendant's] critique of the Class Plaintiffs' evidence may prove fatal **at the merits stage**, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999) (emphasis added); *see also In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) ("The district court correctly noted that its function at the class certification stage was not to determine whether plaintiffs had stated a cause of action or whether they would prevail on the merits, but rather whether they had shown, based on methodology that was not fatally flawed, that the requirements of Rule 23 were met. . . . The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive"). The Fourth Circuit takes the same view as the Second. *See, e.g., Doctor v. Seaboard C. L. R. Co.*, 540 F.2d 699, 708-709 (4th Cir. 1976) ("it was entirely proper for the District Court . . . to identify the character or type (*but not the merits*) of each plaintiff's claim and then to determine whether there was a class to which such claim of the plaintiff was common and of which it was typical, sufficiently numerous to justify class certification.") (emphasis in original).[3]

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[3] *George Lussier Enters. v. Subaru of New Eng., Inc.*, 2001 DNH 143 (D.N.H. 2001) ("the Supreme Court has held that I may not evaluate the merits of a case at the class certification stage"); *Wilson v. Commer. Fed. Mortg. Corp.*, No. 98-J-0184, 2000 U.S. Dist. LEXIS

(Continued on following page)

The Eleventh Circuit's ruling fundamentally changes the role of the district court in class certification in employment discrimination cases, allowing district courts to deny certification if plaintiffs' evidence does not "convince the court" that discrimination exists, and if the discrimination is not "proven with convincing force." The Opinion conflicts with the Second and Fourth Circuits and numerous district courts, and the issue needs resolution by this Court.

2. *Bazemore* prohibits the weighing of expert reports and the omitted variable analysis in which the Eleventh Circuit engaged

While *Eisen* establishes the general rule that the class certification decision cannot be based upon a preliminary ruling on the merits of the evidence, *Bazemore* specifically speaks to a type of evidence at issue here and in almost all class discrimination cases: expert statistical reports. The Eleventh Circuit's Opinion conflicts with this Court's decision in *Bazemore* and creates a clear split with the First, Second, Sixth and Ninth Circuits as to how *Bazemore* will be applied.

a. The Eleventh Circuit has decided this important federal question in a way that conflicts with *Bazemore*

As the Opinion recognizes, the district court did not question the admissibility of Dr. Madden's expert reports or the reliability of her methodology. Pet. 333a ("the Court concludes that while Madden's methodologies may be valid, the analysis has some limitations which undermine its usefulness in measuring whether Defendants'

20270 (N.D. Ala. Feb. 29, 2000) (*Eisen* does not allow "assaying the nature and quality of the evidence under the gossamer veil of a Rule 23 analysis."); *Dicker v. Allstate Life Ins. Co.*, No. 89C4982, 1990 U.S. Dist. LEXIS 8586 (N.D. Ill. July 11, 1990) (same); *Webb v. Westinghouse Electric Corp.*, 78 F.R.D. 645, 650-651 (E.D. Pa. 1978) (same).

employment practices are racially neutral"). Indeed, the multiple regression analyses Dr. Madden employed is a well-accepted manner for proving class-wide discrimination. *Bazemore* itself holds that where, as is the case here, a multiple regression analyses account for the major factors, it is sufficient to prove a pattern and practice of discrimination. *Id.* ("Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case.").

Nonetheless, the district court and the Eleventh Circuit held that Petitioners' expert statistical report was insufficient to convince them that a pattern and practice of discrimination existed because of the alleged omission of certain variables. *Bazemore*, however, holds that such criticisms go to the ***weight***, not the admissibility, of a regression analysis:

> The Court of Appeals erred in stating that petitioners' regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.' The court's view of the evidentiary value of the regression analyses was plainly incorrect. **While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'** Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

478 U.S. at 400 (citation omitted) (emphasis added). Notably, the district court did not find Dr. Madden's reports to be "so incomplete as to be inadmissible as irrelevant." Instead, the Court concluded that it could disregard the reports when ruling on class certification because it was not "convinced" that they proved Petitioners' case. The lower court's decision to reject the reports as raising common questions as to the existence of a pattern

and practice of discrimination (both at the class and the summary judgment stage) directly conflicts with *Bazemore*.

The Opinion also conflicts with *Bazemore* by disregarding Dr. Madden's report based on speculation that some other variables *might* affect the analyses. Dr. Madden's regression analyses control for education (level of degree), experience (both time in work force and tenure at Southern Company), job function, subsidiary, and in certain analyses, job grade – more variables than this Court held were necessary in *Bazemore*. R141, Ex. B at 1-8. She excluded other variables as inappropriate or tainted and explained her analytical choices. *Id.* at 9-27. Moreover, Dr. Madden did, in fact, include most of the variables the district court found were omitted, demonstrating precisely why it is improper for a court to determine the merits of an expert report at class certification, without hearing or other opportunity to probe the evidence.[4] Dr. Madden's complex regression analyses, accepted by numerous courts, are not remotely "bottom line" statistics and are precisely the type of statistics this Court held are sufficient to prove a pattern or practice of discrimination in *Bazemore*.

The Opinion's attempt to distinguish *Bazemore* in a footnote is erroneous. Footnote eleven states that

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[4] The claim that "Madden's reports did not take into account the type or level of acquired skills of job applicants" is incorrect. Pet. App. 32a. First, the reports control for job grade. Under Respondents' common system, jobs are assigned grades according to the "knowledge, skills and responsibilities" needed to perform each job. R119, Ex. 69 at F796. Dr. Madden thus accounted for differences in skill levels when she accounted for job grade. Second, Dr. Madden controlled for job function at hire, which examines "the subject area in which human capital (such as education or work experience) has been accumulated." R141, Ex. 1, App. A. Respondents place each job into a particular function, such as Engineering Services, Accounting, Administration, Customer Services, Information Systems, Human Resources, Marketing and Security. *Id.* As Dr. Madden explained, job function reflects "a business assessment by Southern of the field for which a worker's training and education qualify him or her," and is a better proxy for acquired skills than field of study, the variable Respondents advocate. *Id.* at 22-24.

Bazemore "did not hold that *any* statistical report, no matter how many critical variables were missing, should automatically present a jury question, indicating that there are 'some regressions so incomplete as to be inadmissible as irrelevant.'" Pet. App. 35a (emphasis added). ***But neither the district court nor the panel held that Dr. Madden's reports were "so incomplete as to be inadmissible as irrelevant."*** In fact, the opposite is true. Thus, *Bazemore* applies and mandates that a jury determine the weight to be accorded to the reports.

In a third attempt to distinguish *Bazemore*, the panel held that the "most important[]" distinction between this case and *Bazemore* is that the plaintiffs in *Bazemore* submitted independent analyses that confirmed their results and that the defendants' analysis reached substantially the same results. Pet. App. 34a. But, of course, nothing in *Bazemore* holds or suggests that the admissibility of regression analyses prepared by a plaintiff's expert turns on whether the opposing party's experts agree with the analyses. *See Tyler v. Union Oil Co.*, 304 F.3d 379, 393 (5th Cir. 2002) (under *Bazemore*, the fact that defendant's expert *disagrees* with statistical analysis "goes to the weight of Dr. Frank's testimony, not its admissibility."). Regardless, SoCo's own internal personnel found statistically significant disparities, thus providing the corroboration the Opinion wrongly requires. R119, Exs 12 (at 237, 240-241), 29, 57, 86.

b. The Eleventh Circuit has decided this important federal question in a way that conflicts with other circuits

Other circuits have interpreted *Bazemore* and *Eisen* as precluding the denial of certification or grant of summary judgment based on resolution of disputes raised by admissible expert reports. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 135 ("A district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law. However, a district court may not weigh conflicting expert evidence

or engage in 'statistical dueling' of experts.") (citations omitted). *See Phillips v. Cohen*, 400 F.3d 388, 400-01 (6th Cir. 2005) (court cannot resolve criticism of statistical analysis at summary judgment); *Currier v. United Techs. Corp.*, 393 F.3d 246, 252 (1st Cir. 2004) (that analysis "did not account for variables other than age and was not confined to similarly situated employees, in that there was no breakdown in terms of job, skills, or length of time served" was "a matter of weight rather than admissibility and thus properly a subject of argument and jury judgment."); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188-89 (9th Cir. 2002) (*Bazemore* required that regression controlling only for experience and seniority be submitted to jury for resolution of defense criticisms).

The Second Circuit's decision in *Caridad* exemplifies this approach:

> The District Court relied on the report of [defendant's] statistical expert [] to conclude that the Class Plaintiffs' statistics were inadequate because they failed to take into account the fact that [defendant's] positions have materially different rates of discipline and promotion. Though [defendant's] critique of the Class Plaintiffs' evidence may prove fatal **at the merits stage**, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of "statistical dueling" is not relevant to the certification determination. . . . The Class Plaintiffs submitted evidence that tends to establish that being Black has a statistically significant effect on an employee's likelihood of being promoted. . . . In conducting her analyses, the Class Plaintiffs' expert controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion. These statistical disparities are not insignificant. More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, but this report, in conjunction with the anecdotal evidence, satisfies the Class

> Plaintiffs' burden of demonstrating commonality for purposes of class certification.

191 F.3d at 292-93 (citations omitted) (emphasis added).[6]

Here, the Opinion allows courts ruling on class certification to go beyond determining whether an expert report is admissible and methodologically reliable; to choose sides in a battle of experts; and to decide that Rule 23 is not satisfied based on a finding that an admissible, methodologically valid regression analysis does not provide sufficiently strong evidence of discrimination because the court speculates the analysis should have included additional variables. Pet. App. at 36a, 43a, 50a. The Opinion thus allows district courts to invade the province of the jury and to violate the Supreme Court's decision in *Bazemore*, creating a circuit split with at least the First, Second, Sixth and Ninth Circuits.

By rejecting Dr. Madden's reports based on ***speculation*** that omitted variables ***might*** have eliminated statistical disparities, the Opinion conflicts with *Bazemore* and Second, Third and Ninth Circuit law. *Bazemore*, 478 U.S. at 404 ("Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of – statistical or otherwise – to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites."); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993) ("'[i]mplicit in the *Bazemore* holding is the principle that a mere conjecture or assertion . . . that some missing factor would explain the existing disparities . . . generally cannot defeat the inference of discrimination created by . . . statistics'") (citation omitted); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 34

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[6] *Visa Check*, 280 F.3d at 135; *Shores v. Publix Supermarkets, Inc.*, No. 95-1162, 1996 WL407850, at *7 (M.D. Fla. Mar. 12, 1996) ("The parties present a battle of experts in which Publix attacks several aspects of Plaintiffs' statistical analysis. . . . It is inappropriate for the Court to determine the ultimate correctness of either parties' contentions in the context of class certification.").

(2d Cir. 1988) ("We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the [statistical] showing"); *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 583 (9th Cir. 1989) (same).

The district court and Eleventh Circuit's errors in disregarding *Eisen* and improperly applying *Bazemore* impacted all aspects of the class certification analysis, including the typicality analysis. Although the district court found that Petitioners satisfied typicality with respect to the vast majority of the class, it incorrectly found that the Petitioners' claims were not typical of a few subgroups. Pet. App. 324-26a. Had the district court properly considered Petitioners' expert reports and the fact that all class members asserted the same legal theory (*i.e.*, the same policy of discretionary, non-job-related decision-making for pay and promotions and the same pattern and practice of discrimination), it would have recognized that Petitioners satisfied the typicality requirement for *all* members of the class. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (holding in a *non-discrimination* case that "typicality is established if the claims or defenses of the class and the class representative arise from **the same** event or **pattern or practice** and are based on **the same legal theory**"); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (same); *Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003) (typicality satisfied when plaintiffs allege that a common policy creates a pattern or practice of discrimination, and rejecting argument that a class representative is required for "each job category"). Indeed, on similar facts, the Second Circuit reversed a district court's finding that plaintiffs did not satisfy typicality, concluding that the district court's improper rejection of plaintiffs' multiple regression analyses showing a pattern or practice of discrimination was "central" to its erroneous rejection of typicality, and that the statistical report and anecdotal evidence demonstrated typicality arising out of common policy or practice of delegating discretion to managers.

Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 156 (2d Cir. 2001).

The improper rejection of the statistical evidence fatally impacted the summary judgment rulings as well as class certification. The district court and Eleventh Circuit affirmed that the summary judgment rulings depended on the rejection of the statistical evidence. Pet. App. 50-51a, 103-04a, 137a, 162-63a, 195a, 214-15a, 251a, 276-79a. Reversal of that rejection will require reversal of each summary judgment order.

3. The Eleventh Circuit applies different class certification and summary judgment standards to discrimination cases than to other types of cases

This Court has repeatedly prohibited disparate application of the Rules of Civil Procedure based upon the classification of the claim.[6] However, the Eleventh Circuit has developed a double standard for the application of Rule 23 that distinguishes and elevates the requirements for certification of discrimination actions from the requirements for certification of all other claims. For example, the Eleventh Circuit requires that discrimination plaintiffs present evidence at class certification that "convince[s] the court" that discrimination exists and that "establishes" discrimination to the Court's satisfaction as a precondition to certification. Pet. App. 30a, 37a, 366a. *See also Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (discrimination case – plaintiff must not only *allege* a general policy of race discrimination but must produce "reliable evidence" of discrimination at the class certification stage).

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[6] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002) (courts may not impose pleading requirements upon Title VII cases which differ from those imposed under the Rules of Civil Procedure on all types of cases); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (court cannot create differential procedural requirements for different classes of claims).

In other types of cases, however, the Eleventh Circuit respects *Eisen's* prohibition on ruling on the merits of evidence at the class certification stage. *See, e.g., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 723 (11th Cir. 1987) (securities case – "the court's rejection of the fraud-on-the-market theory was based upon nothing other than the court's assessment of the plaintiffs' likelihood of success on the claims. This is an improper basis for deciding the propriety of a class action."); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 877 (2005) (*allegation* of conspiracy sufficient to establish commonality in RICO case); *Hudson v. Delta Air Lines*, 90 F.3d 451, 457 (11th Cir. 1996) ("We stress initially that the merits of the plaintiffs' claims are not before us." (*citing Eisen*) (ERISA case)); *In re Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447, 452 (N.D. Ala. 2003) (securities case – same); *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 428 (5th Cir. 1971) (same). Thus, in the Eleventh Circuit, discrimination cases are treated differently under Rule 23 than other types of cases.[7]

Indeed, the decision on which the Eleventh Circuit relied to justify the district court's intrusion into the merits in this case is another Eleventh Circuit discrimination case – *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984). *Love* stated, in language quoted by the Eleventh Circuit in this case, that *Eisen's* prohibition on merits determination at class certification "should not be talismanically invoked." *Id.* The Eleventh Circuit has only followed this particular holding of *Love* in discrimination cases. *See, e.g., Kirkpatrick*, 827 F.2d at 723 (declining to apply *Love* to allow review of merits at class stage in securities case).

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[7] The Eleventh Circuit itself appears to recognize that it treats discrimination cases differently. *Klay*, 382 F.3d at 1256-57 (explaining why court's affirmance of certification of RICO class is in "stark contrast" to its analysis in race discrimination cases).

This distinction between discrimination cases and other causes of action permeates Eleventh Circuit jurisprudence on merits as well as class-certification issues, including on such issues as the burden of proof and evidentiary presumptions. Examples from this case include:

a) The "Slap you in the Face" Heightened Burden of Proof – In cases alleging discrimination in promotion, plaintiffs often seek to demonstrate that the defendant's explanation for its promotion decision is mere pretext by presenting evidence that they were more qualified than the person who received the promotion at issue. In such cases, the Eleventh Circuit (along with the Fifth Circuit) holds (and held here) that a preponderance of the evidence is not sufficient and that a plaintiff "must adduce evidence that the disparity in qualifications is 'so apparent as virtually to **jump off the page and slap you in the face**.'" Pet. App. 62a (emphasis added). This heightened burden of proof is applied by the Eleventh Circuit **only** in discrimination cases – precisely the type of disparate application of the rules prohibited by this Court. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) ("for the courts of appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority.") The application of a heightened burden of proof in Title VII cases was specifically rejected by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) ("Conventional rules of civil litigation generally apply in Title VII cases, [citation omitted] and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence.").

Moreover, there is a circuit split on this precise issue. The "slap you in the face" standard has been rejected by the Fourth and Ninth Circuits. *See Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1194 (9th Cir. 2003); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648 (4th Cir. 2002).

b) The requirement to disprove all proffered non-nondiscriminatory reasons – Under the venerable

principal of ***falsus*** *in uno,* ***falsus*** *in omnibus*, evidence of a material misrepresentation will allow the ultimate finder of fact to disbelieve the remainder of the testimony of the witness. *See Kanawha & M. R. Co. v. Kerse*, 239 U.S. 576, 581 (1916). Yet, the Eleventh Circuit has adopted a different rule for discrimination cases, holding that if a defendant proffers multiple nondiscriminatory reasons for the challenged action, and, as here, plaintiff presents evidence that one (or even several) of the proffered reasons are blatantly false, summary judgment will still be granted to the defendant unless the plaintiff demonstrates that "each" of the proffered reasons is false. *Cooper*, 390 F.3d at 726. There is another Circuit split on this issue, with other circuits rejecting the requirement to disprove "each" proffered reason.[8] "[I]t is reasonable, where the showing of pretext as to one reason is sufficiently strong as to permit a jury to find that the employer (or its decision-maker) lacks all credibility, to conclude that summary judgment is inappropriate – even without a specific showing of pretext as to another reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1050 (11th Cir. 2000) (Birch, J. dissenting and collecting cases). The Eleventh Circuit applies this exception to *falsus in uno, falsus in omnibus* only in discrimination cases.

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[8] *Fuentes v. Perskie*, 32 F.3d 759, 764-65 n.7 (3d Cir. 1994) ("the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available."); *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) ("an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire" such that "a multitude of suspicious explanations may itself suggest that the employer's investigatory process was so questionable that any application of the 'honest belief' rule is inappropriate.").

II. The "Catch-22" – Petitioners should have been allowed to pursue an equitable relief-only class

In this case, the Eleventh Circuit held that because Petitioners sought damages and not merely equitable relief, class certification under Rule 23(b)(2) was barred because individual issues relating to damages would always predominate in discrimination class actions seeking damages, adopting *Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998).[9] But Petitioners had also asked alternatively for an equitable relief only class. The Court then held that "to the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief . . . it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members." No other grounds were set forth for denying Petitioners' alternative request for certification only of claims for equitable relief.

This "Catch-22" analysis effectively eliminates class action discrimination cases in the Eleventh Circuit. That is, on the one hand, the Court held that if plaintiffs seek damages, certification is barred because individual issues relating thereto predominate. But, on the other hand, if plaintiffs do not seek damages, they are inadequate for failing to raise all of the class' claims (even though the Court held that class-wide damages claims are barred).

The Eleventh Circuit's inadequacy holding apparently rests on the premise that bringing injunctive relief only class claims would somehow preclude later damages claims by class members. The opinions of several circuits and this Court conflict with that holding. *See Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1983) ("A suit for damages is not precluded by reason of the plaintiff's membership in a class for which no monetary relief is

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[9] Other circuits disagree. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001); *Lemon v. International Union of Operating Engineers Local No. 139*, 216 F.3d 577 (7th Cir. 2000); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

sought."); *Bogard v. Cook*, 586 F.2d 399, 408-09 (5th Cir. 1978) (individual claims for damages are not part of the claim presented by an action for declaratory or injunctive relief under Civil Rule 23(b)(1) or (b)(2).); *Crowder v. Lash*, 687 F.2d 996, 1009 (7th Cir. 1982) (same); *Cotton v. Hutto*, 577 F.2d 453, 454 n.4 (8th Cir. 1978) (same); *Jones-Bey v. Caso*, 535 F.2d 1360, 1361-62 (2d Cir. 1976) (same); *Jahn v. ORCR, Inc.*, 92 P.3d 984, 985 (Colo. 2004) (same). *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (judgment in a class action determining that an employer did not engage in a pattern or practice of discrimination will not bar class members from bringing individual discrimination claims).

In addition to creating conflicts with numerous other circuits and failing to adhere to the precedent of this Court, the Eleventh Circuit's Catch-22 is another example of differential treatment of discrimination claims versus other types of claims. The Eleventh Circuit does not preclude subsequent damages claims as a result of membership in a class seeking injunctive relief outside the realm of employment discrimination. *See Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir. 1993) (prisoner's rights case) ("claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief."); *Herron v. Beck*, 693 F.2d 125, 127 (11th Cir. 1982) ("the class representatives sought only declaratory and injunctive relief, not damages. Thus, the appellant's claim for damages would not be barred by the class action."); *Spears v. Johnson*, 859 F.2d 853, 855 (11th Cir. 1988) (same).

Actions seeking injunctive relief for class-wide discrimination fit squarely within Rule 23(b)(2), which is "intended primarily to facilitate civil rights class actions." *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993 (5th Cir. 1981); Adv. Comm. Notes, 1966 Amendments to Fed. R. Civ. P. 23 ("actions in the civil-rights field where a party is charged with discriminating unlawfully against a class" are illustrative of (b)(2) class actions). Yet, under the Circuit's ruling, there could not be a class action only for injunctive relief to challenge an express policy or uniform

practice of denying all promotions to blacks or women, because prospective class members would have damages claims as well as claims for injunctive relief. This Court should prevent the Eleventh Circuit from effectively eliminating all employment discrimination class actions in the Circuit.

III. The Lower Courts are in disarray over how (or even whether) to apply *Desert Palace* at the summary judgment stage

This case presents important issues relating to the burden of proof in individual employment discrimination actions. Prior to *Desert Palace v. Costa*, 539 U.S. 90 (2003), cases were treated as mixed-motive cases if there were direct evidence of discrimination, and as single-motive cases if the evidence of discrimination was circumstantial. In *Desert Palace*, this Court held that, at least in mixed-motive cases, once a plaintiff presents even circumstantial evidence from which a reasonable jury could find that race was a motivating factor in the adverse employment action, a mixed-motive instruction was required, instructing the jury that if it believed race was a motivating factor, liability was established, and that the burden of proof then shifted to the defendant to prove that it would have taken the same action in the absence of the impermissible motivating factor to limit plaintiff's remedies. If circumstantial evidence that race was a motivating factor is sufficient to sustain a liability verdict at trial, it must be enough to survive summary judgment.

However, in *Desert Palace*, this Court reserved the question of whether the burden shifting framework that case created applies to single-motive cases. Without the prior method of distinguishing between mixed-motive and single-motive cases based on the type of evidence (direct or circumstantial), lower courts have reached conflicting and contradictory results in deciding whether or not to apply *Desert Palace* to particular cases. In this case, the Eleventh Circuit held that Petitioners' claims were not entitled to the application of *Desert Palace* because the case was

not a mixed-motive case, even though the facts presented were similar to those that other circuits have held fall within the rubric of a mixed-motive case and thus require application of *Desert Palace*. This case should be held to be a mixed-motive case in which burden shifting applies within the meaning of *Desert Palace*.

Should the Court here find that the claims are single-motive claims, then the question reserved in *Desert Palace* must be answered. Based on a logical reading of the statute, the answer should be to apply *Desert Palace* to all Title VII cases. Because the determination of the application of the *Desert Palace* rule will impact the burden of proof at summary judgment and trial in every Title VII case, it is important that guidance be provided to the lower courts:

> **[T]here is an issue of transcendent importance that demands imminent resolution. No issue is more crucial to the litigation of intentional discrimination cases than determining what effect the U.S. Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa* has on the pretext proof structure developed by the Court in *McDonnell Douglas Corp. v. Green*. . . . Litigants, lawyers, and judges need an answer to that question now.**

William R. Corbett, *An Allegory Of The Cave And The Desert Palace*, 41 Hous. L. Rev. 1549, 1550 (2005) (emphasis added).

In *Desert Palace*, this Court interpreted 42 U.S.C. § 2000e-2(m), which provides that "an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." 539 U.S. at 94. This Court held that a violation of § 2000e-2(m) can be established through circumstantial as well as direct evidence, and that once a plaintiff presents even circumstantial evidence from which a reasonable jury could find that race was a motivating factor in the adverse employment action, the burden of

proof shifts to the defendant to prove an affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* at 100-01. This Court expressly overruled the "direct evidence" requirement relied upon by the district court here.

At summary judgment, Petitioners set forth a *prima facie* case (and more) through statistical and testimonial evidence of discriminatory intent and animus.[10] Respondents proffered alleged non-discriminatory motives for their conduct, but expressly pleaded that "[s]ome or all of the relief requested in the Complaint is barred because, even if Defendants were found to have considered any impermissible factors in any decisions or actions with respect to any of the Plaintiffs, (which Defendants deny), *Defendants would have taken the same action with regard to such person's employment regardless of any impermissible factors.*" R. 66-7 (emphasis added).[11] This was an invocation of the limited affirmative defense available "[o]n a claim in which an individual proves a violation under section 703(m) [42 USCS § 2000e-2(m)] and a respondent demonstrates that the *respondent would have taken the same action in the absence of the impermissible motivating factor.*" 42 U.S.C. § 2000e-5(g)(2)(B) (emphasis added).

In granting summary judgment as to all claims of the Petitioners, the district court held that because (in its judgment) Petitioners had proffered no "direct" evidence of discrimination,[12] this was not a mixed-motive case and

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[10] As noted above, the improper rejection of the statistical evidence is sufficient to mandate reversal of the summary judgments.

[11] "[T]he terms single-motive and mixed-motive . . . primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination." *Costa v. Desert Palace*, 299 F.3d 838, 854 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

[12] Petitioners proffered ample evidence of racist jokes, racist graffiti, racially hostile remarks, and numerous hangman's nooses hung about the workplaces. *See, e.g.*, Pet. App. 188a. The District Court erroneously held that this was not direct evidence of discrimination. *Id.*

Petitioners were required to proceed under the *McDonnell Douglas* framework. *See, e.g.*, Pet. App. 128a. In other words, the district court applied the distinction between direct and circumstantial evidence that this Court expressly rejected in *Desert Palace*. As a result, the district court held that to avoid summary judgment, Petitioners had the burden to prove pretext as to each of the numerous nondiscriminatory motives proffered by Respondents (*see* Pet. App. 215a), rather than examining whether Petitioners had evidence that race was a motivating factor and imposing the burden upon Respondents to demonstrate that they would have taken the same action without regard to the impermissible factor. Six of the seven Petitioners (all but McCullers) lost at summary judgment based on the alleged failure to prove pretext as to each of Respondents' proffered non-discriminatory motives – a burden that Petitioners were not required to meet under *Desert Palace*.

Petitioners asked for the application of the rule set forth in *Desert Palace* that direct evidence was not required: "[t]he plaintiffs argue, however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L. Ed. 2d 84 (2003)." Pet. App. 48a n.17. Petitioners contend that *Desert Palace* applies whenever there is evidence of alternative motives so that the finder of fact could believe either or both parties as to the defendant's motive. If the plaintiff proffers evidence that race played a role, and the defendant puts in evidence that the plaintiff had a bad attitude, the jury could believe either, or could believe that both factors played a role. The possibility that the finder of fact could believe both factors played a role is sufficient to justify a mixed-motive instruction under *Desert Palace* whether plaintiff's evidence is direct or circumstantial.

The Eleventh Circuit, however, rejected Petitioners' argument for the application of *Desert Palace* to the summary judgment rulings in this case, holding that (a)

this Court would not have *sub silentio* overruled or modified *McDonnell Douglas*; and, (b) *Desert Palace* applies only to mixed-motive cases (ignoring the evidence here of multiple permissible and impermissible motives and the Respondents' invocation of 42 U.S.C. § 2000e-5(g)(2)(B)). But, the only reason for the district court's holding that this was not a mixed-motive case was the absence of direct evidence. And, under the rule applied by other Circuits since *Desert Palace*, this clearly was a mixed-motive case.[13] The Eleventh Circuit's opinion thus adds to the confusing array of circuit and district court opinions trying to apply *Desert Palace* at the summary judgment stage.

Should this Court determine that this case is not a mixed-motive case, then this Court will be confronted with the issue expressly reserved in *Desert Palace* – "when, if ever, § 107 applies outside of the mixed-motive context." *Desert Palace*, at 91 n.1.

> **The judicial response to *Desert Palace* is in disarray**. Federal district courts, even within the same Circuit, as well as a few **circuit courts, have construed *Desert Palace* inconsistently in two ways**. First, the courts disagree over the application of *Desert Palace* at

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[13] *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 193 (4th Cir. 2003) (where plaintiff had evidence of discriminatory motive and defendant argued an entirely nondiscriminatory motive, case is a mixed-motive case); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1072 (9th Cir. 2003) ("Since it is uncontroverted that Marathon has offered two reasons for firing Stegall, yet we hold that the record in this case would support a finding that Marathon had illegitimate motives, it is logical to examine the case as one involving 'mixed motives' "); *Jones v. N.Y. City Health & Hosps. Corp.*, 102 Fed. Appx. 223, 226-227 (2d Cir. 2004) (case is to be treated as a mixed-motive case "where a plaintiff presents 'sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice' "); *Mereish v. Walker*, 359 F.3d 330, 339 (4th Cir. 2004) ("plaintiffs can invoke the codified mixed-motive framework by putting forth any type of evidence – direct or circumstantial – which demonstrates that discriminatory animus was a motivating factor for an employment practice.").

> the summary judgment stage of Title VII litigation. **Specifically, the courts disagree on whether the case applies only to mixed-motive cases under Title VII or also to single-motive cases.**

Jaclyn Borcherding, *Deserting McDonnell Douglas?, Desert Palace, Inc. v. Costa*, 57 Baylor L. Rev. 243, 254 (2005) (emphasis added).

The impact of *Desert Palace* at summary judgment has provoked widely divergent views from the lower courts. *See Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (*Desert Palace* modified *McDonnell Douglas* summary judgment analysis so that at stage three, the plaintiff may prevail if it produces evidence sufficient to create a genuine issue of material fact either that the defendant's articulated reason was a pretext for discrimination **or** that the defendant's reason may be true but another motivating factor for the decision was discrimination); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) (plaintiff may prevail at summary judgment by showing pretext "or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the defendant); *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cir. 2004) (applying *Desert Palace* analysis at summary judgment as an alternative to *McDonnell Douglas*); *Murray v. UFCW, Local 400*, 100 Fed. Appx. 165, 175-76 (4th Cir. 2004) (same); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 990 (D. Minn. 2003) (interpreting *Desert Palace* as an affirmation that Congress intended to abrogate *McDonnell Douglas* with the Civil Rights Act of 1991). *But see* (in addition to this case) *E.E.O.C. v. Minn. Beef Indus., Inc.*, No. Civ. 02-810 DSDSRN, 2003 WL 22956445, at * 2-3 (D. Minn. Dec. 11, 2003) (*Desert Palace* applies to jury instructions; but *McDonnell Douglas* continues to be the test at summary judgment).

By holding that Petitioners could avoid summary judgment only by establishing pretext as to each proffered nondiscriminatory motive and by refusing even to examine

whether Petitioners' evidence was sufficient for a jury to find that "a discriminatory reason more likely than not motivated" defendants, the Opinion conflicts with decisions of other circuits, this Court's decision in *Desert Palace*, and the plain language of 42 U.S.C. § 2000e-2(m). As courts and commentators have recognized, courts desperately need guidance as to what is required to qualify a case as a mixed-motive case after *Desert Palace* and whether there is a distinction between mixed-motive and single-motive cases in the application of *Desert Palace*.

CONCLUSION

This Petition should be granted to resolve circuit splits and to secure the rights afforded by the civil rights laws.

Respectfully submitted,

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

CORNELIUS COOPER, MICHAEL EDWARDS, et al., Plaintiffs-Appellants, versus SOUTHERN COMPANY, GEORGIA POWER COMPANY, et al., Defendants-Appellees.

No. 03-12230

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

390 F.3d 695; 2004 U.S. App. LEXIS 23495; 94 Fair Empl. Prac. Cas. (BNA) 1854; 18 Fla. L. Weekly Fed. C 11

November 10, 2004, Decided
November 10, 2004, Filed

OPINION BY: MARCUS

OPINION: MARCUS, Circuit Judge:

Cornelius Cooper and six other plaintiffs appeal from the district court's orders denying class certification in their employment discrimination suit and entering final summary judgment in favor of the defendants, the Southern Company, Georgia Power Company, Southern Company Services, Inc., and Southern Company Energy Solutions, Inc. Seven current or former employees[1] of the various defendants brought this putative class action, alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 ("Section 1981"). The plaintiffs claimed discrimination in promotions and compensation, and sought declaratory and injunctive relief, back pay, and

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[1] The plaintiffs/appellants are Cornelius Cooper, Michael Edwards, Charcella Green, Patricia Harris, Sarah Jean Harris, Irene McCullers, and Carolyn Wilson.

compensatory and punitive damages. After denying class certification, the district court entered seven separate orders of summary judgment in favor of the defendants.

After painstaking review of the record, as well as careful consideration of the briefs and oral argument, we conclude that the district court did not abuse its discretion in denying class certification, because the plaintiffs demonstrated neither that they had satisfied the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a), nor that damages were incidental to equitable and declaratory relief or that common questions of law or fact predominated, as required under Federal Rule of Civil Procedure 23(b)(2) or (b)(3). In addition, we are persuaded by none of the plaintiffs' arguments regarding the individual summary judgment orders and, accordingly, affirm in all respects the judgments of the district court.

I.

The complex facts and procedural history underlying this appeal are these. Seven African-American past or present employees of the defendant companies filed suit on July 27, 2000, alleging that the Southern Company and several of its subsidiaries – Georgia Power Company, Southern Company Services, Inc. and Southern Company Energy Solutions, Inc. – unlawfully discriminated against their employees on account of race.[2] The plaintiffs alleged

[2] The plaintiffs subsequently amended their Complaint in August, 2000. After the defendants answered the Amended Complaint, and the district court granted permission to amend and supplement the Amended Complaint, the plaintiffs filed a Third Amended Complaint on December 11, 2000. Unless otherwise noted, throughout this opinion

(Continued on following page)

that the defendants discriminated against them in connection with promotion opportunities and performance evaluations, as well as in terms of compensation, and claimed that the defendants tolerated a racially hostile working environment. Notably, the plaintiffs sought to represent a Rule 23 class that they described in the following terms:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices ("the Class").

Cooper v. Southern Co., 205 F.R.D. 596, 598-99 (N.D. Ga. 2001). At the time suit was filed, the proposed class included approximately 2,400 individuals residing in Georgia, Alabama, Florida, and Mississippi, and working at locations dispersed throughout the four states. The proposed class consisted of entry-level manual laborers and skilled professionals, among others, and encompassed exempt, non-exempt,[3] unionized and non-unionized workers.

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references to the "Complaint" are to the plaintiffs' Third Amended Complaint.

[3] Non-exempt employees are covered by the requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, including,

(Continued on following page)

In essence, the plaintiffs maintain that the various defendant companies share a common system for personnel decision-making, which constitutes a "common policy or practice" that is appropriately challenged on a class-wide basis. Specifically, plaintiffs say that there are "common promotion and compensation policies and practices, which give managers unfettered discretion to make subjective, non-job-related decisions." Appellants' Brief at 2. According to plaintiffs, these "common policies and practices . . . foster a pattern or practice of race discrimination or have a disparate impact on black employees," *id.*, and plaintiffs sought to redress the claimed wrongdoing in the form of a class action.

A.

The defendants include four companies that provide a wide range of energy-related products and services throughout the southeastern United States. The Southern Company ("TSC") is a holding company that itself has no employees, but which owns stock in the other defendant companies, all Southern Company subsidiaries. TSC is a Delaware corporation that is domesticated under the laws of Georgia and maintains its corporate headquarters in Atlanta, Georgia. In addition, TSC is the corporate parent of various other utility companies not directly involved in the lawsuit.

Georgia Power Company ("GPC") is the Southern Company's largest subsidiary, and provides electricity to approximately 1.9 million customers in 153 of Georgia's

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for example, its overtime provisions. Exempt employees are not covered by the FLSA.

159 counties. GPC employs approximately 9,000 employees in the state of Georgia, some 44% of whom are covered by a collective bargaining agreement ("CBA") with the International Brotherhood of Electrical Workers ("IBEW"), Local No. 84. GPC's operations are extremely diversified, and its facilities, workforce, and management are dispersed across the entire state of Georgia. Certain functions within GPC are divided among different regions in the state, and widely divergent operating and management structures exist within different regions. Thus, for example, GPC's Customer Operations function across 16 regions that have very different workforces. The expansive and rural Southeast Region has very different characteristics with respect to technology, customer service, and distribution capacity than does the metropolitan Atlanta region, a dense and highly-populated area that includes numerous commercial clients.

Southern Company Energy Solutions ("SCES"), in turn, is a non-regulated, non-utility subsidiary of the Southern Company that develops for sale various energy-related products and services. SCES consults with commercial and industrial clients on energy efficiency, provides energy efficiency and environmental programs and services, and offers other services to commercial and residential customers. Most of the fewer than 300 employees employed by SCES are exempt employees whose compensation is determined by sales commissions; none of SCES's employees is a member of a union.

Finally, Southern Company Services ("SCS") provides the other defendants with human resources services and administers common compensation and promotion policies. SCS also provides various public relations and employee relations services to the other defendant companies. SCS

employs approximately 3,500 non-unionized employees who work primarily in Georgia and Alabama, although they also coordinate services in Mississippi, Florida, New York, and Washington, D.C.

The differences in management structures, working environments, and criteria for employment decisions vary substantially among the defendant companies. The promotion and compensation decisions affecting laborers involved in electrical power transmission and distribution, for example, take into account very different criteria than do decisions involving the professional and managerial ranks of the companies. Similarly, the more than 200 locations in which employees of the different defendants work are spread throughout a widely dispersed geographical area and encompass an extremely diverse range of working environments.

While the operations and workforces of the defendant companies are substantially different, they are linked in several ways. All the defendants maintain a common job, salary, and pay-grade system that dictates salary ranges for both exempt and non-exempt employees. Non-exempt employees are classified from grade NE1 through NE9; exempt employees are classified at grades E1 through E15. Salary ranges for each grade vary significantly.[4] While the same pay-grade system is used within all of

[4] In 1998, for example, grade E5 ranged from $ 42,396 to $ 67,837, and grade E3 ranged from $ 34,020 to $ 54,432. Thus, an employee with a salary at the upper range of one grade might receive a higher salary than an employee with a salary in the lower range of the next higher grade. This could result in a white employee in a lower salary grade receiving a higher salary than a black employee in a higher salary grade. The plaintiffs say that the defendants exploited this possibility to mask racial discrimination.

TSC's subsidiaries, the workforces within the different companies are strikingly different. Not every position exists in every company, and in some subsidiaries the job responsibilities for a given position differ greatly from the responsibilities for the same position in another subsidiary. Job positions may also correspond to different pay-grade ranges within different subsidiaries.

The terms of compensation for unionized workers are strictly governed by the terms of the CBA, giving managers precious little discretion over salary and similar issues. For non-unionized workers, hiring and promotion decisions are made by managers of various rank based in geographically dispersed facilities within each of the defendant companies. Different managers assign various weights to different qualifications in making their employment decisions, and managers have the discretion to utilize a wide range of processes and procedures when making compensation and promotion decisions.

Several different types of promotions are available to non-unionized employees. Most competitive job openings – jobs open to any qualified employee – are posted on a computer intranet system known as "JobNet," which is accessible to employees within each TSC subsidiary. SCS recommends standardized processes for filling JobNet positions, but managers within the various subsidiaries retain discretion in choosing whether to post job vacancies.

Other promotions occur outside the context of the competitive promotions available on JobNet. For example, employees can advance within their own "job family. "These "progressive promotions" occur when employees meet predetermined performance goals or demonstrate satisfactory work over a given period. Under these circumstances,

an employee may be promoted, for example, from an Operator II position to an Operator I position. These promotions are not competitive since they do not involve unfilled positions, but rather are available only to employees progressing individually within their own job family.

SCS also provides numerous programs and procedures designed to assist managers within the other defendant companies in evaluating employees and making compensation and promotion decisions. These procedures are designed to ensure that employees are evaluated, compensated, and promoted based on job-related factors, in accordance with the companies' strict prohibitions on discrimination on account of race. Thus, for instance, SCS provides the defendant companies with resources to assist managers in promotion decisions, including structured interview guidelines, designed to evaluate job-related skills. SCS also recommends that employees receive regular written and oral evaluations, and develops specific evaluation forms for this purpose.

SCS and the other defendants have all developed affirmative action plans to address workforce diversity, and they also provide professional development and professional mentoring programs to facilitate employees' professional growth. SCS's Equal Employment Opportunity ("EEO") Department has primary responsibility for ensuring compliance with anti-discrimination and equal opportunity laws. The EEO Department's policy is to investigate discrimination complaints, and if any discrimination or harassment is revealed, to take remedial action to eliminate the discrimination or harassment. SCS's EEO Department also acts in conjunction with Compliance Officers within each defendant company to conduct annual compliance surveys. Every individual

employee within the defendant companies receives an annual compliance questionnaire, which asks whether the employee is aware of any incidents of discrimination or harassment.

The EEO Department also conducts quarterly Equal Employment Opportunity reviews designed to ensure that all the defendant companies comply not only with the applicable anti-discrimination laws, but also with their own internal policies. In these reviews, the EEO Department evaluates the hiring, promotion, and compensation practices of randomly selected departments within the various defendant companies, with the goal of remedying any inconsistencies that may exist between a department's practice and the defendant's EEO policies.

The defendant companies have also implemented various training programs to promote compliance with all EEO policies and anti-discrimination laws. Many of the defendants' managers are required to attend "FEDLAW," a one-day seminar that provides an overview of the federal anti-discrimination laws applicable to the defendants' workplaces. The defendants also encourage their employees and managers to attend another one-day training session, the "Civil Treatment" seminar. In the "Civil Treatment" training, employees are reminded of the defendants' anti-discrimination policies and encouraged to report any violations.

Finally, all employees of SCS and SCES are entitled to raise EEO concerns with SCS's Employee Concerns department, and unionized employees at GPC may raise discrimination complaints with their union stewards, pursuant to successive agreements between GPC and Local 84 of the IBEW. GPC employees may also bring

complaints to the Corporate Concerns Department or the Corporate Security Department.

B.

The seven named plaintiffs are African Americans who work (or formerly worked) in a wide assortment of union and non-union positions within GPC, SCS and SCES, and who have been subjected to compensation and promotion decisions made by different managers utilizing different procedures. We analyze in detail the individual claims of each plaintiff in Section III, *infra*, which addresses each of the summary judgment orders, but offer here a brief summary of each plaintiff's work history in order to measure his or her claims against the standards embodied in Rule 23 of the Federal Rules of Civil Procedure.

Cornelius Cooper ("Cooper") works as a Lineman for GPC in Atlanta, Georgia, where he has been employed since 1973. At the time the suit was filed, Cooper had been employed by GPC for some 28 years. He has been a union member during his employment at GPC, and thus, his compensation and promotions within the bargaining unit have been governed by the terms of the CBA. Cooper received his current Lineman position in 1981 and has not been promoted since, in spite of positive work evaluations; he claims that less qualified white employees have been promoted while he could not advance for nearly 20 years.

Cooper has not taken the First Line Supervisor test, nor has he applied for a Foreman position since at least 1990, because no Foreman positions have been open in that time. He has not applied to be a crew leader. However, Cooper maintains that he suffered discrimination

when he was denied two promotions in 1998. The first position that Cooper was denied was as a Lighting Coordinator, an opening that was posted on JobNet in July 1998. Later that year, Cooper applied for and was denied a non-union Methods & Training Specialist ("Trainer") position at the Klondike Training Center. Of several Trainer jobs open at the time, at least one was awarded to an African-American employee, Charlie Johnson.

Michael Edwards ("Edwards") had worked at GPC for 13 years when this suit was commenced. Like Cooper, Edwards has held a variety of union positions in which his compensation and promotions were subject to the terms of the CBA. Over the course of his employment with GPC, Edwards worked in several different departments of the company, based in different cities throughout Georgia. He maintains that he has been denied various promotions to union positions, especially in the two years immediately before the suit was filed, and was frequently denied even an opportunity to interview for these positions.

In April 2000, Edwards did interview for a Cable Locator position, but was denied the job. Edwards says that he was fully qualified for the position, having worked for 5 months as a Cable Locator in a temporary capacity, and having worked as a Lineman, which involved more extensive and difficult responsibilities than a Cable Locator. In spite of his qualifications, Edwards did not receive the job, which was instead given to a white co-worker whom Edwards argues was less qualified. Edwards was denied the Cable Locator position after his interviewers found his demeanor "too relaxed."

During his tenure at GPC, Edwards suffered injuries to his back, and as a result he has had several extended

absences and light duty assignments. Between May and November, 1998, Edwards took a medical leave from GPC, returning to take a temporary position which he held until its elimination in April 2000. Since that time he has been out of work on disability leave.

Edwards filed a complaint with the EEOC in 1999, alleging a violation of the Americans with Disabilities Act ("ADA"), but he did not allege any race-based discrimination at that time. Less than a week prior to the filing of this suit, however, he lodged a complaint with the EEOC that alleged individual and class-wide racial discrimination. On appeal, Edwards raises three other promotion claims that were not included in the Complaint.

Charcella Green ("Green") had been employed at GPC for 17 years when this suit was filed. For the last 11 of those years she worked as an Education Services Coordinator, after having been employed in various capacities since initially joining GPC as a temporary intern in 1983. While Green advanced through various positions at GPC, she acquired several educational credentials. Prior to joining GPC, Green received a B.S. degree in Human Services Administration from Mercer University, and in 1983 she was awarded a Master of Social Work degree. While working at GPC, she continued her education, eventually receiving a Ph.D. from Clark Atlanta University.

From 1996 until her department was eliminated in 2002, Green worked at GPC's headquarters in Atlanta in a range of exempt positions in the Educational Services department. She complains that she was wrongfully denied an Educational Services Manager position in 1996 and a Community Advisor position in 1997. On July 11,

1998, Green was again denied a Manager of Educational Services position that was awarded to a white employee. Green also says that she has been compensated at a less favorable rate than white employees.

Patricia Harris ("P. Harris") voluntarily resigned from SCS in August 1999, prior to the commencement of this case. P. Harris began working at GPC in 1990, and became an employee of SCS in 1997, when she began working as a Market Research Analyst in Atlanta. P. Harris did not apply for any promotions during the relevant period and did not file any complaints with the EEOC. However, she maintains that she was only granted her Market Research Analyst position after repeatedly complaining – including to a GPC Vice President – about the difficulty of advancing. P. Harris contends that her white counterparts were promoted much more easily, and says that once she began working as a Market Research Analyst, she was provided with less training and support than her white colleagues.

P. Harris also claims that she suffered discrimination in compensation on account of race, observing that she was paid at the low end of her salary grade, while white colleagues were more generously compensated, notwithstanding their being less qualified. Indeed, P. Harris points out that she earned a Master of Business Administration degree, while her white co-workers lacked that credential.

Sarah Jean Harris ("S.J. Harris") was employed by GPC from 1979 until 2000, working in various non-exempt, non-union customer services positions in Lawrenceville, Duluth, and Gwinnet, Georgia. Hired in 1979 as a General Clerk, she had been promoted to Operating Assistant by 1989. In 1994, S.J. Harris was assigned to

work in Duluth as a Secretary; her job title was changed to Region Support Representative in 1997. Working as a Region Support Representative, S.J. Harris was the only African-American employee in an 18-person department. She alleges that she was discriminated against in her employee evaluations, claiming that she received lower evaluation scores than she deserved, while white employees received inappropriately positive evaluations. She also observes that she received only "minuscule" salary increases during her tenure, and has therefore received lower compensation than white employees.

S.J. Harris did not apply for any promotions during the relevant period and has brought no promotion claims. However, in addition to raising her compensation discrimination claims, S.J. Harris contends that she was wrongfully fired in retaliation for her involvement in this lawsuit. GPC denies any retaliatory motive and contends that she was fired for disciplinary reasons, after having received several negative evaluations and having been placed in a disciplinary program. While on "last-chance" probation, S.J. Harris was again disciplined, and then was terminated.

Irene McCullers ("McCullers") was hired by GPC in 1978, and worked in several clerical positions until 1997, when she was transferred to SCS. Since 1997, McCullers has worked at SCS as a non-exempt Processing Operator I in the Information Management Services Department. Altogether, McCullers had spent 23 years working for the defendant companies at the time suit was filed. McCullers alleges that she was discriminated against in terms of her compensation, promotions, and performance evaluations.

Specifically, McCullers contends that within her department there are six employees working as Processing Operators: two African-American and two white employees hold Processing Operator I titles, and two white employees hold Processing Operator Senior positions. McCullers alleges that she and her African-American colleague are victims of racial discrimination in that they are the lowest paid employees. McCullers adds that she is paid approximately 10% less than her white colleagues, even though she has an associates degree in business administration, while the white employees have no more than a high school education.

McCullers also maintains that she has been discriminated against in promotions. She avers that at the time her department was reorganized in 1997, she was discriminatorily denied a progressive promotion from Processing Operator I to Processing Operator Senior, while at least one white counterpart was promoted to the senior position. In the two years before this litigation commenced, McCullers was again denied a promotion to Processing Operator Senior, while another white colleague was promoted.

Finally, Carolyn Wilson ("Wilson"), the seventh of the named plaintiffs, began working for the defendants in 1985, when she was hired by GPC as an employee in its Customer Service Operations. In 1997, she was hired as a Project Analyst in the Finance Center at SCES. Wilson maintains that she experienced racial discrimination in promotion and compensation decisions, as well as with respect to her performance evaluations. Wilson says that she uniformly performed her job well and received positive performance evaluations, and yet was denied numerous promotions for which she was qualified. She adds that

while she applied for approximately 15 promotions within the defendant companies, she was granted only 3 interviews, and was denied several promotions because of her race. In November 1997, Wilson applied for and was granted a Project Analyst Senior position at SCES, which she learned of through the JobNet system, but her position was re-classified as a Project Analyst III, a lower-level position than she had sought. The following year, Wilson applied for and was offered a Customer Service Representative position, but turned it down.

At approximately the same time this lawsuit was commenced, Wilson filed a charge with the EEOC, but she did not identify the specific event or events that constituted the discrimination she faced, instead alleging discrimination more generally. She maintains that she is compensated less favorably than at least four white colleagues who perform the same job as she does, even though they are classified at the same, or lower, salary grades.

To summarize, of the seven named plaintiffs, three no longer worked for any of the defendants at the time this case was commenced (Edwards, P. Harris, and S.J. Harris). Of the four remaining employees, one held a position which was covered by the CBA (Cooper), two held exempt positions outside senior management (Green and Wilson), and one held a non-exempt position (McCullers).

Although at various times during their employment with the defendants, some of the plaintiffs worked in Georgia locations outside metropolitan Atlanta, most of them were employed in Atlanta for most or all of their tenures. Several of the named plaintiffs worked in office environments characteristic of the central administrative

operations that took place in Atlanta, and even Edwards and Cooper – who labored in connection with the direct delivery of electricity – worked in more developed urban areas of Georgia. None of the named plaintiffs worked in the less densely populated, rural areas of the state, and although the plaintiffs sought to represent a broad class including employees based throughout Florida, Mississippi, and Alabama, none of them worked within these states.

All of the plaintiffs complained of discrimination in either compensation or promotion, and while none of the plaintiffs produced direct evidence that the personnel decisions in their individual cases were motivated by race, each plaintiff alleged that he or she was victimized by a common policy of subjective decision-making that allowed discrimination to persist in the defendant companies. Specifically, the plaintiffs' Complaint asserted that there was a class-wide "continuing pattern and practice of racial discrimination," that they and the putative class members were subjected to discriminatory treatment, and that the defendants' policies and practices "had an ongoing disparate impact."

Two major issues are presented in this appeal. First, plaintiffs argue that the district court abused its discretion when it denied their motion for class certification under Rule 23 of the Federal Rules of Civil Procedure. Second, they say that the district court erred when it granted summary judgment in favor of the defendants on each of the seven named plaintiffs' individual claims. We address each of these issues in turn.

II.

We begin with the plaintiffs' basic argument that the district court abused its discretion when it denied their motion for class certification.[5] In denying the plaintiffs'

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[5] As a preliminary matter, the defendants suggest that if we affirm the district court's summary judgment orders as to each of the named plaintiffs, the class certification issue is moot. This position has intuitive appeal, since it might seem improbable that plaintiffs whose own claims cannot survive summary judgment could represent a larger class of plaintiffs. That is, if we affirm the final orders of summary judgment on the named plaintiffs' claims, it would appear unnecessary to reach the class certification issue, because even if other class members retained valid claims, they would have no representative plaintiffs to prosecute their claims. *See Satterwhite v. City of Greenville*, 634 F.2d 231, 234 (5th Cir. 1981) (*en banc*) (Gee, C.J., dissenting) (arguing that requiring an appellate court to revisit the class certification issue even if the named plaintiffs' claims fail could lead to the "extreme" result "that a class need have no personal representative at all: only a putative cause and a counsel").

The plaintiffs, on the other hand, have directed our attention to *Martinez-Mendoza v. Champion International Corp.*, 340 F.3d 1200 (11th Cir. 2003), in which a panel of this Court held that "even after finding against plaintiffs on the merits, the [district] court should have determined whether the class action could be maintained, and whether the plaintiffs could represent that class." *Id.* at 1215. *Martinez-Mendoza* reflects established Circuit precedent that requires us to revisit the class certification issue even if we affirm summary judgment for the defendants.

In *White v. I.T.T.*, 718 F.2d 994 (11th Cir. 1983), a panel of this Court explained that where

> a plaintiff brings both an individual and class action; the class action is dismissed pretrial; he loses his individual claim at trial and then appeals the dismissal of his class action . . . we have remanded the case to the district court to determine (1) the presence of a live controversy involving the proposed class, and if one is present, (2) whether, pursuant to Rule 23, the action is appropriate for class certification and the appellant is a proper representative of the proposed class (or if not, whether there exists an appropriate class representative who can be substituted for the appellant).

(Continued on following page)

motion, the district court first considered the plaintiffs' anecdotal and statistical evidence, before concluding that the plaintiffs could not satisfy the basic requirements of Rule 23(a) of the Federal Rules of Civil Procedure.[6] Alternatively, the district court held that individual questions of law and fact plainly outweighed any common questions, and therefore that this suit was not appropriate for certification under either subsection (2) or (3) of Rule 23(b) of the Federal Rules of Civil Procedure.[7] The plaintiffs maintain

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Id. at 997-98. It is "the law of this circuit . . . [that] a plaintiff's capacity to act as representative of the class is not ipso facto terminated when he loses his case on the merits." *Martinez-Mendoza*, 340 F.3d at 1215; *see also Satterwhite*, 634 F.2d at 231-32; *Armour v. City of Anniston*, 654 F.2d 382, 383 (5th Cir. Unit B Aug. 1981) (per curiam). (In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.).

Under the law of this Circuit, a live controversy involving a putative class may continue even when the claim of a specific plaintiff fails. Thus, even if we affirm each summary judgment order entered against the individual plaintiffs, the class certification issue may not be moot, and we are still required to address the district court's denial of class certification.

[6] Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed R. Civ. P. 23(a). We refer to these four requirements as the numerosity, commonality, typicality, and adequacy criteria. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000).

[7] Rule 23(b) provides, in pertinent part, that:

> an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(Continued on following page)

that the district court's denial of class certification results from "fundamental errors of law and a fundamental misconception of the role of the court in ruling on a motion for class certification." Appellants' Brief at 8. We remain unpersuaded.

A.

Questions concerning class certification are left to the sound discretion of the district court. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1386 (11th Cir. 1998) (*en banc*); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1347 (11th Cir. 1983). "A district court's decision whether or not to certify a class under Rule 23 of the FRCP is reviewed for abuse of discretion. As long as the district court's reasoning stays within the parameters of Rule 23's requirements for the certification of a class, the district court

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. . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed R. Civ. P. 23(b).

decision will not be disturbed." *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir. 2003) (citations omitted).

Even if we would have certified a class, that does not mean the district court abused its discretion in declining to do so. *Id.*; *see also Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1374 (11th Cir. 1984). Indeed, the distinguishing hallmark of abuse-of-discretion review is that it "presupposes a zone of choice within which the trial courts may go either way." *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984).

> By definition . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review. As we have stated previously, the abuse of discretion standard allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment."

Rasbury v. I.R.S., 24 F.3d 159, 168 (11th Cir. 1994) (*quoting United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989) (citation omitted)).

First, the plaintiffs argue that the district court erred by "reaching the merits" of the plaintiffs' claim at the preliminary stage of class certification. Thus, we are required to determine whether the trial court properly assessed the plaintiffs' evidence only to the extent necessary to decide the issue of class certification, or whether the trial judge impermissibly usurped the role of the jury by ruling on the merits of the plaintiffs' statistical and expert evidence. After thorough review of this record, we are satisfied that the district court did not improperly

invade the jury's province when it conducted (as it was required to do in this case) a rigorous analysis of the evidence proffered by the parties at the class certification stage.

The plaintiffs rely on the Supreme Court's often-cited admonition in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177, 94 S. Ct. at 2152. However, we have noted that "while it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) (citation omitted).

Indeed, both the Supreme Court and this Court have noted since *Eisen* that evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the "merits" of the litigation. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12, 98 S. Ct. 2454, 2458 n.12, 57 L. Ed. 2d 351 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." (citation omitted)); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (explaining that Rule 23(a) evidence "is often intertwined with the merits").

As the Supreme Court has noted, the bare allegation that racial discrimination has occurred "neither determines whether a class action may be maintained . . . nor defines the class that may be certified." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740 (1982). Rather, before a district court determines the efficacy of class certification, it may be required to make an informed assessment of the parties' evidence. That a trial court does so does not mean that it has erroneously "reached the merits" of the litigation. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 722 (11th Cir. 1987).

In this case, the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at the very least, whether the named plaintiffs were claiming discrimination that was common to the members of the putative class. Indeed, the district court would have erred if it had certified a class without first determining that the named plaintiffs had claims common to those of the unnamed class members.

B.

We turn, then, to whether the court's substantive determinations at the class certification stage amounted to an abuse of discretion. The plaintiffs say that the district court erred by concluding that they had failed to establish the commonality, typicality, and adequacy[8] requirements of

[8] The district court concluded that because they failed the commonality and typicality requirements under Rule 23(a), the named plaintiffs could not adequately represent the other putative class members. *See Cooper*, 205 F.R.D. at 627. The district court did, however, determine that the plaintiffs' counsel were "capable and

(Continued on following page)

Rule 23(a). They claim that there were questions of law and fact common to the entire class and that the claims of the named plaintiffs were in fact typical of all the class members.

The four basic requirements of Rule 23(a) are "designed to effectively limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims." *Prado-Steiman*, 221 F.3d at 1278 (*quoting Falcon*, 457 U.S. at 156, 102 S. Ct. at 2370) (internal quotation marks omitted). As the district court put it, Rule 23(a) is designed to ensure that "the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives." *Cooper*, 205 F.R.D. at 608-09.

The typicality and commonality requirements are distinct but interrelated, as the Supreme Court has made clear:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Falcon, 457 U.S. at 157 n.13, 102 S. Ct. at 2370 n.13. We have similarly explained that "the commonality and

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experienced lawyers who would more than adequately represent the class, were a class certified." *Id.* The defendants do not challenge this conclusion concerning the adequacy of plaintiffs' representation.

typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado-Steiman*, 221 F.3d at 1278.

"A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). "Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Prado-Steiman*, 221 F.3d at 1279.

While not entirely dissimilar to the typicality requirement, Rule 23(a)'s commonality requirement measures the extent to which all members of a putative class have similar claims. "Traditionally, commonality refers to the group characteristics of the class as a whole [while] typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Id.* Under the commonality requirement, "a class action must involve issues that are susceptible to class-wide proof." *Murray*, 244 F.3d at 811.

Neither the typicality nor the commonality requirement "mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative class members do not defeat certification." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (citation omitted); *see also Prado-Steiman*, 221 F.3d at 1279 n.14; *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). Nevertheless, the named plaintiffs' claims must still share "the same essential characteristics as the

claims of the class at large." *Appleyard*, 754 F.2d at 958 (citation and internal quotation marks omitted).

As for the typicality requirement, the district court concluded that while some of the named plaintiffs had claims that could be typical of subgroups within the larger class, collectively the named plaintiffs did not have claims typical of the entire class. Thus, for example, plaintiff Edwards's claims were uniquely tied to issues relating to his disability; plaintiff S.J. Harris's claims could not be divorced from the disciplinary issues relating to her case; and although Cooper's claims were typical of union members denied promotion to non-union jobs, they were not typical of those union members who might have complaints relating to the denial of union positions.

Similarly, none of the named plaintiffs had claims typical of members of the putative class who were denied senior management positions, nor did any of the named plaintiffs have compensation claims typical of upper-management employees. And while the plaintiffs' claims may have been typical of some subclasses of the defendants' workforce, it is not certain that their claims would be typical of other subclasses. Thus, for example, the specific job-related criteria GPC uses to make employment decisions affecting its rural power-delivery operations may be very different from the criteria underlying decisions about employees in their administrative offices. As a result, the named plaintiffs did not present claims typical of the full range of employees in their putative class.

The plaintiffs argue, nevertheless, that the district court erred by focusing on the idiosyncratic features of the different named plaintiffs' claims instead of acknowledging that the claims of the plaintiffs and the members of the

larger class were based on the same legal theories. That is, the plaintiffs say that their individual injuries "arise out of the same pattern and practice [of discrimination] and same [discriminatory] policies that give rise to the injuries of the class members." Appellants' Brief at 18.

We reiterate that our review is only for abuse of discretion, and that whether we would have certified the class in the first instance – or even some grouping of subclasses – is not dispositive. *Hines*, 334 F.3d at 1257; *see also Shroder*, 729 F.2d at 1374. Here, the district court's analysis as to typicality fell within the range of choice permissible on abuse-of-discretion review and did not represent a clear error in judgment. *See Kelly*, 888 F.2d at 745.

First, the compensation and promotion decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and performance in interviews, among other factors. In *Love v. Turlington*, we held that the district court had not abused its discretion in denying class certification based on the plaintiffs' failure to meet the typicality and commonality requirements. 733 F.2d at 1564. That case involved a challenge to Florida's SSAT-I, a test designed to identify high school students who had failed to master one of the state's academic performance standards. Students failing the test were identified for remedial assistance, but a failure did not automatically render a student ineligible for a high school diploma. Rather, decisions on each individual student's eligibility for a diploma were "made by individual teachers on the basis of [the student's] individual achievements. Each student's situation differs,

and the diploma is denied each student for reasons which are unique to his situation, and which do not necessarily correspond to his performance on the SSAT-I." *Id.* Similarly, in the instant case the compensation and promotion decisions affecting each of the named plaintiffs were based on factors that, by and large, appear unique to each of the plaintiffs in question.

In addition, the plaintiffs sought to represent a very broad class that purported to represent all African-American employees of the defendants, at all levels of the corporate hierarchy of all the defendant companies. Because the plaintiffs asserted broad claims on behalf of a broad class, they were required to identify representative plaintiffs who shared those broad claims. However, while the different named plaintiffs may have had claims that were typical of some conceivable subgroups of the overall class, the seven named plaintiffs, collectively, did not have claims that would have been typical of the entire class. *See Falcon*, 457 U.S. at 156, 102 S. Ct. at 2370; *Hines*, 334 F.3d at 1257-58. As a result, we are constrained to conclude that the district court's conclusions regarding typicality did not constitute a clear error of judgment, nor were they otherwise outside the range of choices the district court was allowed to make.

As for the commonality requirement, the district court concluded that it was impossible to say that the employment histories of the named plaintiffs and the ways in which they claimed to have experienced discrimination could be "fairly compared with the history or individual experiences of absent class members," or that the claims of class members shared such common features that rulings could be fashioned to fairly adjudicate the claims as a group. *Cooper*, 205 F.R.D. at 610-611. Where, as here, class

certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes. *See, e.g., Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999) (denying certification where proposed class spread across fifteen states and involved seventeen business units); *Troupe v. Randall's Food & Drugs, Inc.*, 1999 U.S. Dist. LEXIS 11620, No. CIV.A. 3:98-CV-2462, 1999 WL 552727, at *5 (N.D. Tex. July 28, 1999) (declining to certify proposed class that covered at least "fifty separate stores spread over two large cities and their outlying suburbs" with "management practices vary[ing] widely according to stores across the division").

Since the hiring, compensation, and promotion decisions at issue were made by different managers in different companies implementing different policies, even if the named plaintiffs established that they were, individually, subjected to intentional discrimination, they would not necessarily have established that other class members suffered from the same discrimination. Commonality in the claims of the broad class the plaintiffs sought to certify would have to be established by showing that the discrimination sustained was either part of an overarching pattern and practice of intentional discrimination on the part of the defendants or the result of the discriminatory disparate impact of a facially neutral employment policy.

We explain the elements required to sustain a successful pattern and practice or disparate impact claim more fully in Section III.B., *infra*, but a brief overview suffices for our purposes here. To establish a "pattern or practice"

of disparate treatment,[9] the plaintiff must show that intentional discrimination was the employer's "standard operating procedure." *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 at 1274 (explaining different types of discrimination claims in context of gender discrimination). The plaintiff can prove that discrimination was the standard operating procedure "through a combination of statistics and anecdotes." *Id.* To prove disparate impact, a plaintiff must establish the existence of a statistically significant disparity among members of different groups affected by a type of employment decision; a specific, facially neutral employment practice involved in the decision; and a causal nexus between the facially neutral employment practice and the statistically significant disparity. *Id.*

Thus, it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it established the discrimination of which plaintiffs complained. The district court concluded the statistical "analysis had some limitations which undermined its usefulness in measuring whether Defendants' employment practices were racially neutral." *Cooper*, 205 F.R.D. at 613. Because of substantial analytical flaws in the statistical evidence, the plaintiffs had made an "inadequate showing . . . to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies. Thus, disparate impact analysis produced no evidence

[9] To prove disparate treatment, a plaintiff (as do plaintiffs here) usually seeks to establish that he or she is a member of a protected group; that he or she was subjected to an adverse employment decision; that the employer treated similarly situated employees outside the protected group more favorably; and that he or she was qualified for the job. *Joe's Stone Crab*, 220 F.3d at 1274-75.

common to the claims of all class members. Also, the [statistical evidence] failed to establish evidence of a pattern and practice of discrimination." *Id.* at 615 (emphasis added).

The plaintiffs' primary statistical evidence was found in reports by Dr. Janice Madden, who analyzed employment data provided by the defendants.[10] Dr. Madden's reports concluded that African Americans received fewer promotions than would be expected given their numbers in the workforce. However, after analyzing Madden's methodology and conclusions, the district court identified several basic infirmities that undermined the reports' substantive value. The district court did not exclude Dr. Madden's reports because she was unqualified or because the reports were based on a wholly unreliable methodology; rather, the court accepted the reports' conclusions but determined that they still failed to establish that the

[10] The plaintiffs also submitted an expert report prepared by Dr. Kevin R. Murphy, a psychologist, who examined various affidavits and deposition testimony provided by the plaintiffs and concluded that while the defendants actually had policies in practice to prevent discrimination, they undermined these policies "by affording managers discretion to ignore those policies and use criteria that are not job related" in making compensation and promotion decisions. R119-56 at 2. In essence, Murphy's report recapitulated the basic allegations of the plaintiffs in the guise of an expert report. The defendants submitted an expert report prepared by Dr. Ronald R. Sims, which concluded that Murphy's report was "neither accurate nor reliable," R136-2 at 4, and that in fact the defendants had in place policies that prevented managers from exercising unfettered discretion to make decisions on non-job-related bases. We agree with the district court that the reports of Murphy and Sims, which reach sweeping conclusions about what may or may not occur within the defendant companies, are of extremely limited use, lacking statistical evidence to substantiate broad claims that, in essence, simply recharge the allegations of the parties to this litigation. *See Cooper*, 205 F.R.D. at 611 & n.24.

named plaintiffs had claims in common with other class members under either a pattern and practice or disparate impact theory.

In the first place, the district court noted that Madden's reports did not incorporate variables that would allow for the comparison of individuals who were similarly situated with respect to managerial decision makers, job types, locations, departments, and the specific criteria relevant for the jobs in question. Madden did not tailor her analysis to the specific positions, job locations, or departmental and organizational structures in question; however, the wide-ranging and highly diversified nature of the defendants' operations requires that employee comparisons take these distinctions into account in order to ensure that the black and white employees being compared are similarly situated. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57, 109 S. Ct. 2115, 2124-25, 104 L. Ed. 2d 733 (1989) ("[A] Title VII plaintiff does not make a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force."); *see also Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) ("Statistics . . . without a [proper] analytic foundation[] are virtually meaningless."); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 319 (7th Cir. 2003) ("The Supreme Court has emphasized the importance of looking to the proper base 'group' when making statistical comparisons and examining all of the surrounding facts and circumstances which create the statistics themselves.").

As the district court observed, Madden's reports did not take into account the type or level of acquired skills of job applicants. Madden's "education" component failed to take into account the field of study, the relevance of that

field to any position in question, or the quality of the educational institutions involved, factors which may be important in some managers' employment decisions.

Moreover, Madden calculated "experience" only by tabulating the amount of time that had passed since an individual finished his or her formal education and the amount of time that individual had spent on the defendants' payroll. That two employees completed their education in the same year does not ensure that they have similar levels of job-related experience, since what those employees have done in the intervening years may be extraordinarily different. While Madden's "experience" variable may have measured the passage of time, it did not in any way factor in the quality, type, or relevance of an employee's experience. And the reports did not factor in any employee's actual job performance, a consideration that is undeniably important in decisions relating to compensation and promotion. Indeed, without taking into account job performance at all, the fact that two employees began their employment with the defendants at the same time and have not been promoted at the same rate does not establish that discrimination is at work.

In essence, the district court concluded that these methodological deficiencies rendered it "impossible to determine what the [salary and promotions] gaps were, whether they were statistically significant, or whether factors other than race were involved." *Cooper*, 205 F.R.D. at 615. Thus, the district court observed that "there had been an inadequate showing by Plaintiffs to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies." *Id.*; *see also Maddox v. Claytor*, 764 F.2d 1539, 1552 (11th Cir. 1985) ("[Multiple regression analysis]

measures the probability that the calculated disparity could occur randomly – but the analysis in no way validates the calculation of the disparity itself. If the tested disparity is based on erroneous assumptions or suffers from flaws in the underlying data, then standard deviation analysis is foredoomed to yield an equally faulty result."); *Eastland v. Tenn. Valley Auth.*, 704 F.2d 613, 621-24 (11th Cir. 1983).

The district court also observed that Madden's analysis of promotion rates was, similarly, grounded in insufficiently tailored data. Significantly, Madden failed to distinguish between competitive promotions – those open to any qualified candidate – and progressive promotions – those available only to individual employees progressing in a "job family" – a distinction that is crucial when analyzing promotions. *See Forehand v. Fla. State Hosp.*, 89 F.3d 1562, 1572-73 (11th Cir. 1996). As for progressive promotions, because Madden recognized promotions only when an employee received an increase in salary grade, moved from a non-exempt to an exempt position, or moved from a union job into a higher-paying non-union job, Madden's calculations did not capture those that occurred within the same salary grade. As for competitive promotions, Madden did not take into account how many and which employees actually applied for them, also a significant factor in making any meaningful generalizations about allegedly discriminatory promotion practices.

As part of her analysis, Madden divided the employees into different "pools," or subsets, of employees, and her analysis revealed statistical deficiencies in only some of the pools. Of the 148 pools of employees analyzed in 1998-1999, Madden's analysis revealed a representational deficiency of African-American employees in only three

pools: two union salary-grade pools and one pool for non-exempt salary-grade-5 employees. The district court concluded that this actually could be evidence that the promotional deficiencies for African Americans may have existed only in some segments of the workforce, and therefore not throughout the entire class.

Finally, the district court observed that Madden's reports did not establish the existence of any specific promotion or compensation policy or practice, let alone trace the alleged racial disparities to such a policy or practice. In addition, the Madden reports did not make any reference to any of the specific named plaintiffs or their specific similarly-situated comparators, making it altogether unclear how the reports could establish commonality among these named plaintiffs' claims and the overall claims of the affected class.[11]

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[11] Several of the flaws in plaintiffs' statistical evidence that the district court highlighted were initially pointed out in the report of defense expert Dr. Joan G. Haworth, an economist, who included statistical analyses that contradict Madden's reports and support the defendants' claim of no discrimination. In response to these criticisms of Dr. Madden's statistical reports, the plaintiffs cite *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986), which held that the failure of the plaintiffs' multiple regression analyses to incorporate all conceivable variables affected the weight of the analyses but not their admissibility. Plaintiffs argue that the district court here ignored *Bazemore* by inappropriately evaluating the probative value of the statistical evidence, rather than leaving that task to the jury.

Plaintiffs' reliance on *Bazemore* is unavailing in this case. First, *Bazemore* held that a statistical analysis should not be rejected merely because it fails to incorporate every possible variable; it did not hold that any statistical report, no matter how many critical variables were missing, should automatically present a jury question, indicating that there are "some regressions so incomplete as to be inadmissible as irrelevant." *Id.* at 400 n.10, 106 S. Ct. at 3009 n.10. Moreover, in

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The district court concluded that because of these flaws in Madden's models, it was impossible to determine how wide a real gap, if any, existed in salaries and promotion rates among white and black employees, or whether any such gap was attributable to factors other than race. We are persuaded that the district court's basic conclusion – that plaintiffs' statistical evidence was insufficient to establish a presumption of discrimination common to the claims of all members of the putative class – did not constitute a clear error of judgment, nor was the conclusion otherwise outside the acceptable range of choices.

The plaintiffs also proffered, in addition to the statistical evidence, a range of anecdotal evidence that, they claimed, shed additional light on the defendants' allegedly discriminatory policies and practices. Among the evidence presented were reports of several ugly incidents involving nooses displayed at some locations within some of the defendants' facilities, reports of racial jokes and slurs, and the belief expressed by various employees that there was a "glass ceiling" for African-American employees. Finally, plaintiffs filed a series of affidavits of prospective class members who offered anecdotal evidence that repeated many of the claims plaintiffs had made in their pleadings. The district court determined that the anecdotal evidence was "inadequate to establish . . . a pattern and practice of discrimination." *Cooper*, 205 F.R.D. at 619. Again, we conclude that the district court acted within its discretion

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Bazemore, the plaintiffs submitted independently conducted statistical analyses that confirmed the validity of their regressions, and most importantly, the defendants' statistical analysis reached substantially the same results as did those of the plaintiffs. *Id.* at 401, 106 S. Ct. at 3009. That was not the case here, where the defendants' analyses expressly contradicted those of the plaintiffs.

in determining that, given the sheer size and geographically dispersed nature of the defendants' workforce, the anecdotal evidence – disturbing as some of it may have been – was inadequate to establish discrimination class-wide.

After thorough review of the entire record, we conclude that the district court did not abuse its discretion in determining that the statistical and anecdotal evidence submitted by the plaintiffs did not establish pattern and practice discrimination common to the class or a common disparate impact affecting the defendants' African-American employees class-wide. The powerful differences between the named plaintiffs' claims and the claims of the overall class members meant that procedural fairness for all members of the putative class would not be ensured if the claims of the entire class were allowed to rise or fall on the fortunes of the named plaintiffs' claims.

C.

Even if we concluded, however, that the district court abused its discretion in determining that the plaintiffs did not meet two of the requirements of Rule 23(a), certification would still be inappropriate unless the plaintiffs also could satisfy at least one of the requirements of Rule 23(b). *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). As another ground for its decision, the district court concluded that certification was inappropriate under either Rule 23(b)(2) or Rule 23(b)(3). On appeal the plaintiffs say that the district court erred in refusing to certify a class under Rule 23(b)(2) for injunctive relief and back pay or to certify a hybrid class under Rule 23(b)(2) for injunctive relief, while severing the

damages phase of the proceedings by allowing opt-outs for damages. They also argue that the court should have certified a class under Rule 23(b)(3) for injunctive relief, back pay, and damages. We remain unconvinced and, accordingly, hold that the district court did not abuse its discretion in concluding that the requirements of Rule 23(b) were not satisfied either.

Under Rule 23(b)(2), class certification is appropriate when the requirements of Rule 23(a) are met and the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Back pay is considered equitable relief and can therefore be awarded in a case certified under Rule 23(b)(2). *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974).

Here, however, the plaintiffs also sought compensatory and punitive damages, legal relief that can only be awarded in a Rule 23(b)(2) class action when the damages sought are "incidental" to the claims for equitable and declaratory relief. *Murray*, 244 F.3d at 812. Damage claims in a Rule 23(b)(2) class action must be incidental to the equitable and declaratory relief because the basic premise of such a class action – that class members suffer a common injury properly addressed by class-wide equitable relief – "begins to break down when the class seeks to recover . . . monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (*quoting Eubanks v. Billington*, 324 U.S. App. D.C. 41, 110 F.3d 87, 95 (D.C. Cir. 1997)) (internal quotation marks omitted).

We explained in Murray those criteria used to evaluate whether money damages should be considered "incidental" to equitable claims in a 23(b)(2) case. In Murray, we adopted the position of the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*:

> By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief. . . . Liability for incidental damages should not . . . entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Murray, 244 F.3d at 812 (*quoting Allison*, 151 F.3d at 415).[12] In keeping with the requirement that monetary damages be incidental to equitable relief in Rule 23(b)(2) class actions, the advisory committee's note to Rule 23 explains that certification under section (b)(2) is not proper in "cases in which the appropriate final relief relates exclusively or predominantly to money damages."

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[12] The plaintiffs say that "the question of whether claims for damages are 'incidental' to claims for injunctive relief is improper," Appellants' Brief at 22, and urge this Court to adopt the position taken by the Second Circuit, which has rejected the incidental damages standard. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 167 (2d Cir. 2001). However, Murray unambiguously explained that the *Allison* incidental damages standard is the proper legal standard to analyze certification under Rule 23(b)(2) in the Eleventh Circuit. We are bound to apply the standard outlined in *Murray*, since one panel of this Court cannot overrule another. That power is reserved only to the full Eleventh Circuit sitting *en banc* or to the United States Supreme Court. *Julius v. Johnson*, 755 F.2d 1403, 1404 (11th Cir. 1985).

Fed. R. Civ. P. 23, advisory committee's note (emphasis added).

The plaintiffs argue, nevertheless, that the district court could have certified a class under Rule 23(b)(2) only as to the injunctive and declaratory prayer for relief, thereby excluding altogether the damages issues from class certification. However, to the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief that consisted of an admonition to follow general principles of settled law,[13] it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members. Indeed, to many of the class members (and especially to those who no longer work for the defendants), the monetary damages requested might be of far greater significance than injunctive relief, stated at a high order of abstraction, that simply directs the defendants not to discriminate. Moreover, determining the level of damages to which each class member was entitled plainly would require detailed, case-by-case fact finding, carefully calibrated for each individual employee. The "complex, individualized determinations" necessary to fix the appropriate level of individual damage awards in this case are exactly the type that *Murray* and *Allison* make clear

[13] The injunctive relief specified in the plaintiffs' Complaint consists of a request for "preliminary and permanent injunctive relief to end Defendants' discriminatory practices and to prevent current and future harm to the Named Plaintiffs and the Class." Complaint at 59. Similarly, the Complaint seeks declaratory relief in the form of a "judgment that Defendants' acts and practices as set forth herein are in violation of the laws of the United States." *Id.* Thus, the declaratory and injunctive relief plaintiffs seek amounts, in essence, to an order stating that the defendants discriminated against African-American employees, and enjoining them from discriminating in the future.

should not be considered "incidental" to the claims for injunctive and declaratory relief.[14]

Finally, as the district court noted, since the plaintiffs demanded a jury trial in this case, the parties were entitled under the Seventh Amendment to have all matters at law determined by a single jury before having decisions concerning equitable relief made by the trial court. *See Cooper*, 205 F.R.D. at 629 (citing *Ross v. Bernhard*, 396 U.S. 531, 538-39, 90 S. Ct. 733, 738, 24 L. Ed. 2d 729 (1970)). Under the circumstances of this case, even assuming that the district court could conduct an initial bench trial on the merits of the equitable claims, and that the court actually found in favor of the plaintiffs, it would still

[14] Moreover, the cases plaintiffs cite in support of their claim that the district court abused its discretion by refusing to certify an injunctive class under Rule 23(b)(2) while allowing for opt-outs on compensatory damages are inapposite. Neither *Pettway*, 494 F.2d at 256-60, nor *Penson v. Terminal Transportation Co.*, 634 F.2d 989 (5th Cir. Unit B Jan. 1981), nor, finally, *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), involved a hybrid trial in which members of an injunctive class could opt out for compensatory and punitive damages, since these remedies were not at stake in those cases. Indeed, all of these cases predate the Civil Rights Act of 1991, which changed the landscape of employment discrimination law by making available compensatory and punitive damages (as well as the right to trial by jury) in Title VII cases. We explained in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir. 1986) that "[a] hybrid Rule 23(b)(2) class action is one in which class members seek individual monetary relief, typically back pay, in addition to class-wide injunctive or declaratory relief." (citing *Penson*, 634 F.2d at 994) (emphasis added). The cases relied on by the plaintiffs stand for the proposition that it may be appropriate to use a bifurcated or hybrid trial process in Rule 23(b)(2) cases when class-wide injunctive relief is appropriate, followed by individualized awards of back pay. Significantly, these cases do not hold that such a process is appropriate (much less required, as plaintiffs would have it) when highly individualized awards of compensatory and punitive damages are at stake.

be necessary for a single jury to hear and rule on more than 2,000 individual claims for compensatory damages. Again, on this record we can discern no abuse of discretion in the district court's refusal to proceed under the class action umbrella.

The plaintiffs also say that even if certification under Rule 23(b)(2) was not appropriate, the district court still should have certified the class for equitable relief, back pay, and damages under Rule 23(b)(3). But, for class certification under Rule 23(b)(3) to be appropriate, common questions still must "predominate over any questions affecting only individual members" and the class action mechanism must be "superior . . . for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

We have explained that in addition to the requirements embodied in Rule 23(a), Rule 23(b)(3) "imposes two additional requirements, and increased efficiency is only one of them. Predominance is the other. . . ." *Jackson*, 130 F.3d at 1006. Therefore, "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989) (citation and internal quotation marks omitted). Common issues will not predominate over individual questions if, "as a practical matter, the resolution of . . . [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues." *Andrews v. AT&T*, 95 F.3d 1014, 1023 (11th Cir. 1996). Our case law plainly establishes that a class action should not proceed under Rule 23(b)(3) when it appears that "most, if not all, of the plaintiffs' claims will stand or fall, not on the question whether [the defendant] has a practice or policy of [race]

discrimination, but on the resolution of . . . highly case-specific factual issues." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228 at 1235 (*quoting Jackson*, 130 F.3d at 1006) (internal quotation marks omitted). Indeed, the predominance requirement under Rule 23(b)(3) is "far more demanding" than Rule 23(a)'s commonality requirement. *Jackson*, 130 F.3d at 1005 (citation and internal quotation marks omitted).

Here, the plaintiffs attempted to use statistical proof to establish the existence of a generalized policy of discrimination that provided the common thread linking together plaintiffs' otherwise disparate and individualized claims. However, we agree with the district court that substantial limitations in the plaintiffs' statistical evidence rendered the form of proof wholly insufficient to show that any pattern or practice of discrimination disparately affected the plaintiffs' class, or, for that matter, that the defendants had a general policy of discrimination. *See Cooper*, 205 F.R.D. at 630. Moreover, the individual determinations on liability and damages necessary for the individual plaintiffs to succeed would require highly fact-specific inquiries concerning each plaintiff. Thus, we can discern no abuse of discretion in the district court's determination that the issues subject to individualized proof predominated over those that could be established with class-wide proof, and therefore that the Rule 23(b)(3) class action procedure would not be superior for the fair and efficient adjudication of the controversy.

III.

A.

Finally, we turn to the district court's orders granting summary judgment in favor of the defendants on the claims of each of the seven individual plaintiffs. We review the district court's orders granting summary judgment *de novo*, applying the same legal standards as the district court did and viewing all of the facts in the light most favorable to the non-moving party. *See, e.g., Johnson v. Booker. T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 507 (11th Cir. 2000). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (*quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)). "All reasonable doubts about the facts should be resolved in favor of the non-movant." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (*quoting Clemons v. Dougherty County*, 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

B.

As we have observed, the plaintiffs claimed racial discrimination under three distinct Title VII theories: pattern and practice discrimination, disparate treatment

discrimination, and disparate impact discrimination. *See Joe's Stone Crab*, 220 F.3d at 1273. The first two theories require the plaintiffs to prove discriminatory intent; the third does not. *Id.* The plaintiffs also assert claims under Section 1981, which, unlike Title VII, only provides a cause of action for claims involving intentional discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835 (1982); *Brown*, 939 F.2d at 949.

The basic legal framework governing these theories is by now well-established. In a disparate treatment case, the plaintiff bears the burden of proving that the employer intentionally discriminated against him because of his race. *See Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997). The plaintiff can establish discriminatory intent through either direct[15] or indirect evidence; to establish a *prima facie* case of intentional discrimination using circumstantial evidence, plaintiffs may use the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[16]

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[15] Direct evidence is evidence which itself proves the existence of discrimination and does not require inference or interpretation, as for example a frank admission from a manager that he refused to hire an applicant because he was black or because she was female. As would be expected, such direct evidence is encountered only infrequently, since direct evidence "is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999) (citation and internal quotation marks omitted).

[16] The *McDonnell Douglas* framework for establishing a *prima facie* case is used in intentional discrimination cases brought under either Title VII or Section 1981. *Sledge v. Goodyear Dunlop Tires N.A., Ltd.*, 275 F.3d 1014, 1015 n.1 (11th Cir. 2001). Under *McDonnell Douglas*, a plaintiff may establish a *prima facie* case of discrimination in promotion by

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Again, in a "pattern and practice" disparate treatment case, "the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's 'standard operating procedure.'" *Joe's Stone Crab*, 220 F.3d at 1274 (citation omitted). "To meet this burden of proof, a plaintiff must 'prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. It has to establish by a preponderance of the evidence that . . . discrimination [is] . . . the regular rather than unusual practice.'" *Id.* at 1286-87 (*quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 at 336, 52 L. Ed. 2d 396, 97 S. Ct. 1843 at 1843).

To state a claim under a disparate impact theory, in contrast, a plaintiff need not establish that he suffered intentional discrimination. Rather, "disparate impact theory prohibits neutral employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily-protected group." *Id.* at 1274. We have noted that the disparate impact theory is "a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices." *Id.*

Thus, to state a *prima facie* case of disparate impact discrimination, a plaintiff must establish that (1) there is a significant statistical disparity among members of different racial groups; (2) there is a specific, facially-neutral employment policy or practice; and (3) there is a

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establishing that (1) he belongs to a racial minority; (2) he was qualified for and applied for a position the employer was trying to fill; (3) he was denied the position; and (4) others who were not members of the protected class were hired, or the employer continued to seek applicants with the plaintiff's qualifications. 411 U.S. at 802, 93 S. Ct. at 1824.

causal nexus between the specific policy or practice and the statistical disparity. *Id* Moreover, in order to satisfy the third, critical requirement, a plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* at 1274-75 (citation and internal quotation marks omitted).

In general terms, disparate impact cases are more amenable than other types of discrimination claims to class treatment, since they arise out of specific policies or practices that have a disproportionate impact on an entire class of employees. In contrast, when disparate treatment is the basis of a class action, it is generally more likely that individual issues will predominate and make proceeding in a class action format inappropriate. *See, e.g., Reyes v. Walt Disney World Co.*, 176 F.R.D. 654, 658 (M.D. Fla. 1998) (explaining that disparate treatment claims are inherently "highly individualized" and where employees worked in different divisions with different structures and decision makers, each plaintiff was subject to his "own set of unique circumstances surrounding the adverse employment action about which they now attempt to collectively complain").

In a discrimination action brought under either Title VII or Section 1981, a plaintiff must first establish a *prima facie* case of discrimination, which the defendant can rebut by offering a legitimate, non-discriminatory reason for the allegedly discriminatory act. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000). "In other words, the defendant must produce evidence that the plaintiff was rejected, or someone else was preferred, for a

legitimate, nondiscriminatory reason." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1983) (citation and internal quotation marks omitted). "It is important to bear in mind . . . that the defendant's burden of rebuttal is exceedingly light. . . . At this stage of the inquiry, the defendant need not persuade the court that its proffered reasons are legitimate; the defendant's burden is merely one of production, not proof." *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983) (citation and internal quotation marks omitted).[17]

[17] The plaintiffs argue, however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). According to the plaintiffs, *Desert Palace* overruled *McDonnell Douglas* and its progeny, so that "once a plaintiff establishes a *prima facie* case of discrimination, a defendant may no longer simply articulate a legitimate, non-discriminatory reason for the adverse employment action, but rather must prove that it would have taken the same action absent the alleged discrimination." Appellants' January 9, 2004 Notice of Supplemental Authority at 1.

The plaintiffs read *Desert Palace* too broadly. While it is true that some courts have suggested that *Desert Palace* may spell the end of the *McDonnell Douglas* burden-shifting analysis, *see, e.g.*, *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 990-91 (D. Minn. 2003), the *Desert Palace* holding was expressly limited to the context of mixed-motive discrimination cases under 42 U.S.C. § 2000e-2(m). Indeed, the Court explained that it did not decide whether its analysis applied in other contexts. *Desert Palace*, 539 U.S. at 94 n.1, 123 S. Ct. at 2151 n.1. Moreover, the fact that the Court did not even mention *McDonnell Douglas* in *Desert Palace* makes us even more reluctant to believe that *Desert Palace* should be understood to overrule that seminal precedent. Finally, after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases. *See, e.g.*, *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289-90 (11th Cir. 2003).

If the defendant successfully rebuts the plaintiff's *prima facie* case, "the presumption of discrimination is eliminated." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*). To survive summary judgment, the plaintiff must then "come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Id.* (*quoting Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997)); *see also Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106; *Perryman*, 698 F.2d at 1142. To show that the employer's reasons were pretextual, the plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538. "If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim." *Chapman*, 229 F.3d at 1024-25; *see also Combs*, 106 F.3d at 1529 (explaining that the plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action").

The plaintiffs argue that they have presented sufficient statistical evidence in support of their pattern and practice and disparate impact claims to raise genuine issues of material fact, and thus to defeat summary judgment. In contrast to the individual claims of disparate

treatment, which we address *infra*, the pattern and practice and disparate impact claims depend on the same body of statistical evidence. Accordingly, these claims stand or fall in concert.

As we have observed at some length, the statistical evidence consists primarily of two expert reports authored by Dr. Janice Madden. However, Dr. Madden's reports were not sufficiently tailored to compare similarly situated employees. They failed to effectively measure job-related skills, education, experience, and job performance, using only broad, imprecise measurements as proxies for work experience. Nor did the reports sufficiently narrow the classes of employees who were compared, instead using company-wide data that did not reliably identify discrimination within designated segments of the workforce. And, as we have observed, the reports did not distinguish between competitive and non-competitive promotions, did not capture in-grade progressive promotions and did not measure outcomes for employees who actually applied for promotions as opposed to those who did not.

After reviewing this body of statistical evidence, we agree with the district court that basic analytical deficiencies in the reports render them insufficient to support a conclusion that intentional discrimination was the defendants' standard operating procedure. Even if we accept all the calculations underlying Madden's reports as correct, the reports' conclusions are of very limited value because the data on which those calculations were based was not meaningfully tailored. That is, even crediting as true the conclusions, we do not believe that a jury reasonably could infer, based on the evidence, that the plaintiffs established a pattern and practice claim. Summary judgment was

therefore properly entered for the defendants as to the plaintiffs' discriminatory pattern and practice claims.

Moreover, the district court properly entered summary judgment for the defendants on the disparate impact claims. The plaintiffs say they identified a statistical disparity between white and black employees, along with a facially neutral employment practice – the use of subjective hiring criteria by the defendants – that has caused this disparity. First, however, a substantial question exists as to whether the plaintiffs' statistical evidence is sufficiently tailored to establish statistical disparities within the specific segments of the defendants' workforce in which the individual plaintiffs worked. *See, e.g., Maddox*, 764 F.2d at 1549-50. But even assuming that the plaintiffs had met this requirement, they have failed to demonstrate a causal nexus between any statistical disparities in the defendants' workforce and the practice of using partially subjective hiring criteria by some managers in some of the defendants' facilities. *See, e.g., Wards Cove Packing*, 490 U.S. at 651-55, 109 S. Ct. at 2121-24. Accordingly, the district court did not err in entering summary judgment for the defendants on the plaintiffs' disparate impact claims.

We turn, then, to the arguments mounted by each plaintiff concerning his or her disparate treatment claims.

C. Cornelius Cooper

Cooper asserts that the district court erred by entering final summary judgment in favor of the defendants on

his individual disparate treatment claims.[18] Specifically, Cooper argues that the district court erred in entering summary judgment against him as to the denial of two promotions in 1998, one to a Lighting Coordinator position and the other to a Trainer position.[19] Cooper also argues

[18] The district court granted summary judgment in favor of defendant SCES on the ground that Cooper had abandoned any claims against SCES, and in favor of TSC and SCS because Cooper was never an employee of these defendants. R301 at 1-2; *see Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998) (explaining that a plaintiff must be an employee to bring an employment discrimination lawsuit). As for GPC, the district court found that although Cooper had been an employee of that defendant, his claims failed for other reasons. While Cooper's arguments on appeal are phrased in terms of "the defendants" and "Southern" generally, in substance they are directed to the district court's analysis of his claims against GPC. To the extent that Cooper argues that TSC and/or SCS were "joint employers," we are unpersuaded and conclude that Cooper was an employee of GPC only. Accordingly, we affirm the district court's entry of summary judgment against Cooper and in favor of TSC, SCES, and SCS.

[19] In a notice of supplemental authority, the plaintiffs claim that under *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 158 L. Ed. 2d 645, 124 S. Ct. 1836 (2004), the district court erroneously applied a two-year statute of limitations to the plaintiffs' Section 1981 claims, thus barring claims based on events that occurred more than two years before this lawsuit was filed (for example, claims based on Cooper's being denied promotions more than two years before suit was filed). While it is true that the Supreme Court held in *Jones* that claims made possible by the amendment to Section 1981 in the Civil Rights Act of 1991 were governed by the four-year federal "catch-all" statute of limitations, the plaintiffs are barred from arguing that their claims are governed by a four-year limitations period because they have waived the issue. The plaintiffs did not argue in the district court, or, indeed, in their briefs submitted to this court that a four-year limitations period applied to their claims, and "parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority." *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000). As our case law makes clear, parties "must submit all issues on appeal in their

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that the district court erred in excluding an expert report which, he claims, would have established that it was highly unlikely that the selection process used to deny him his position was "race blind."

Cooper first says that he established pretext as to the denial of a Lighting Coordinator job within GPC's Lighting Services Business Unit ("LSBU"). Lighting Coordinators at GPC are involved in selling outdoor lighting systems and overseeing the installation and maintenance of these systems by outside contractors. Cooper was one of more than fifty applicants for two Lighting Coordinator positions posted on the defendants' JobNet system in 1998, but was denied an interview for the position. He established a *prima facie* case that the denial of the promotion was discriminatory, but the district court concluded he had failed to show that the legitimate, non-discriminatory reasons for GPC's denying him the promotion were pretextual.

We dispense first with Cooper's suggestion that statistical evidence found in the declaration of expert John Del Roccili raised a genuine issue of material fact concerning whether the interview selection process used by GPC was race blind. The district court excluded Del Roccili's declaration after finding that the plaintiffs had not properly identified Del Roccili as an expert or provided a

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initial briefs. When new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on intervening decisions or new developments regarding issues already properly raised in the inital briefs." *Id.* (citations and internal quotation marks omitted) (final emphasis added); *see also United States v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001) ("Because this issue is raised for the first time in supplemental briefing, we deem it waived.").

statement of his intended testimony, as required by Rule 26 of the Federal Rules of Civil Procedure. The district court also held that, to the extent the plaintiffs sought to use Del Roccili as a fact witness, his declaration was inadmissible because he lacked personal knowledge of the data about which he opined.

We review the district court's decision to exclude Del Roccili's declaration for abuse of discretion, *see Benson v. Tocco, Inc.*, 113 F.3d 1203, 1208 (11th Cir. 1997), and conclude that the district court clearly acted within its discretion here. Under Federal Rule of Civil Procedure 26, all parties must disclose expert opinion reports when directed by the court, or at least 90 days before trial. These reports must contain "a complete statement of all opinions to be expressed and the basis and reasons therefor." Fed. R. Civ. P. 26(a)(2)(B). Under Rule 37(c)(1) of the Federal Rules of Civil Procedure, a party "that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1).

In this case, plaintiffs originally represented that Del Roccili was a fact witness, but later identified him as an expert witness in response to defendants' discovery requests. However, the plaintiffs never provided defendants with an expert report containing Del Roccili's opinions or, for that matter, the bases for his opinions, as required under Rule 26. Because the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise, *see Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000), compliance with the requirements of Rule 26 is not merely aspirational.

Plaintiffs have identified Del Roccili as "an expert in extracting and analyzing data from human resources databases," R282 at 2, and in his declaration, Del Roccili extracted substantial data from the defendants' databases, performed statistical probability calculations, and expressed opinions about the significance of these calculations. While we do not evaluate the reliability of DelRoccili's opinions, the techniques utilized and opinions presented plainly require the kind of technical or specialized knowledge that is the hallmark of expert evidence. *See* Fed. R. Evid. 702. We therefore conclude that Del Roccili's declaration was properly construed as an expert report and, thus, because the plaintiffs failed to comply with the explicit requirements of Rule 26, it was within the sound discretion of the trial judge to sanction plaintiffs for their failure to disclose by enforcing the unambiguous terms of Rule 37(c). *See Firefighters' Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 902 (8th Cir. 2000).

Cooper claims, however, that he has demonstrated pretext even in the absence of Del Roccili's declaration. We remain unpersuaded. It is undisputed that LSBU Sales Manager Mike Clay was responsible for choosing for interviews applicants who had applied for the Lighting Coordinator positions. After receiving more than 50 applications for the openings, Clay reviewed a computer-generated list of applicants, including a candidate profile listing each applicant's work history. Clay reviewed the applicant profiles and selected candidates to interview based on the following specific job-related criteria: applicants needed at least two years of experience in power delivery; demonstrated communication, leadership and teamwork skills; experience in contract administration

and contractor supervision; and experience as a foreman. Clay also considered applicants whom he knew personally, for whom he had received recommendations, and who had taken initiative by expressing specific interest in learning more about the Lighting Coordinator positions. Clay stated that he did not select Cooper for an interview because (1) Cooper lacked any experience as a foreman; (2) Cooper was not known personally to Clay; (3) Cooper had not been recommended; and (4) Cooper had not contacted Clay or other members of the LSBU regarding the positions.

Cooper contends that Clay's stated reliance on recommendations was pretextual. Because the JobNet posting did not require applicants to submit a recommendation, Cooper says that Clay's use of this non-posted requirement created an "informal, secretive and subjective . . . promotion decision process [which] tended to facilitate the consideration of impermissible criteria." *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 798 (11th Cir. 1988). We are unpersuaded that Clay's use of applicant recommendations as one factor – among other, clearly job-related factors – in determining who would be interviewed was a pretext for a secretive, subjective, and discriminatory process. Moreover, GPC has offered evidence that one preferred qualification was that an applicant had previously served as foreman – a legitimate, job-related requirement – and Cooper had not served as a foreman. In short, Cooper has not shown that GPC's proffered, legitimate reasons for denying him an interview were "unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981).

Cooper also claims that he was discriminated against on account of race when he was denied a non-union job as

a Trainer, and that he has raised a genuine question that the legitimate reasons provided for the denial of this job were also pretextual. Trainers work with line crew employees, instructing them on safety techniques and job-related skills through hands-on training. The defendants maintain that, in addition to requiring technical knowledge, the Trainer position requires significant communication skills, since Trainers must be able to teach their charges efficiently. The hiring manager in charge of filling the Trainer vacancies, Francis Howard, stated that he did not select Cooper because he believed Cooper did not possess superior communication skills, job knowledge, experience, teamwork skills, and peer credibility. Howard also said that he learned from other members of the Screening Committee that Cooper had experienced difficulty articulating training instructions to student employees when he served as a guest instructor at the Training Center. *See* R-204-2 at 10.

Cooper responds that he did have the necessary communication and other skills. However, the crucial question here is not whether Cooper fulfilled the requirements, but whether Howard honestly believed that Cooper did not meet the criteria. *See Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Cooper does not dispute that some selection committee members told Howard that Cooper had trouble articulating instructions to trainees when he served as guest trainer. Nor has Cooper presented any evidence suggesting that Howard did not genuinely believe that Cooper did not posses the requisite job skills.

Moreover, Howard testified that he honestly believed Cooper did not have up-to-date job knowledge of overhead lines at the time trainers were hired. Howard drew this

conclusion because Cooper only had experience in underground cable repair during the two years preceding his Trainer application. Cooper says that because GPC was filling both overhead and underground Trainer positions, this reason is also pretextual. Again, however, Cooper has presented no evidence suggesting that Howard did not honestly believe a trainer required up-to-date knowledge of all line crew work, including overhead and underground cable repair.

Finally, Cooper challenges Howard's explanation that Cooper lacked peer credibility and teamwork skills. But here, again, Cooper's argument that he indeed possessed these attributes is wide of the mark: Cooper has offered no evidence that Howard did not honestly believe this. Short of some evidence that Howard did not genuinely believe the legitimate reasons, on this bare record we will not second-guess Howard's honest assessment of Cooper's qualifications. *See id.* ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." (citation and internal quotation marks omitted)). "We do not ask whether the employer selected the 'most' qualified candidate, but only whether it selected the candidate based on an unlawful motive." *Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) (citation omitted). And even if Cooper could discredit one of the reasons Howard offered for not hiring him, it would still not establish pretext, because to do so, Cooper would have to establish that each of Howard's reasons was pretextual. *See Chapman*, 229 F.3d at 1024-25 ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant

employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim." (emphasis added)). This he has failed to do.

In short, because Cooper has not raised a genuine issue of material fact as to each of the legitimate reasons proffered for why he was not offered the Lighting Coordinator or Trainer position in 1998, the district court did not err in awarding GPC final summary judgment.

D. Michael Edwards

The plaintiff Edwards complained that he suffered discrimination when his managers at GPC denied him numerous promotions. On appeal, he alleges the district court erred in its review of the denial of four specific promotions for which he applied.[20] Edwards maintains that it was on account of race that GPC declined to offer him a promotion to a Cable Locator position in April 2000; to an Operator I job in March 2000; to an Operating Service Representative position in June 1999; and to a Power Delivery Supervisor position, also in 1999.[21] The

[20] Edwards argues repeatedly that "Southern" denied him various promotions; in actuality, managers at GPC declined to promote him. Because Edwards was never an employee of TSC, SCES, or SCS, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis evaluates whether summary judgment was properly granted as to defendant GPC.

[21] Because Edwards only offers arguments related to the denial of these four specific promotions, he is deemed to have abandoned any claims concerning any other allegedly discriminatory denials of promotion. *See, e.g., Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 2004 WL 2113022, at *6 (11th Cir. 2004); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003).

district court concluded that Edwards failed to show that the legitimate, non-discriminatory explanations offered for hiring other candidates were pretextual. We agree.

During his 13 years at GPC, Edwards worked in a range of different union positions, at a range of locations. Between 1987 and December 1990, Edwards served as Laborer in the Nuclear Operations area of a plant in Waynesboro, Georgia. After leaving that position, he served until July 1993 as a Line Crew Helper in Augusta, Georgia, before working as an Apprentice Lineman in Hinesville, Georgia until April 1996. Beginning at that time, Edwards worked as a Lineman based in Tucker, Georgia. While Edwards progressed through these various positions during his tenure at GPC, he complains that several promotions he sought in 1999 and 2000 were denied him on account of race.

We begin with GPC's decision not to offer him a Cable Locator position in April 2000. After suffering various injuries that interfered with his working as a Lineman – including a severe thumb injury and damage to his back – and after taking various medical leaves and light-duty assignments, Edwards received an assignment as a temporary cable locator in November 1999. In that capacity, Edwards reported to James Weldon, GPC's Cable Locating Manager, and was responsible for locating underground electrical cable while facilitating engineering, construction, and other projects. After working as a temporary Cable Locator for four or five months, Edwards applied for a full-time Cable Locator position in early April 2000.

Weldon was the hiring manager for the permanent Cable Locator position, and he chose seven individuals,

including Edwards, for interviews. Along with a Human Resources Representative who worked as a facilitator, Weldon assembled an interviewing panel that included, in addition to Weldon, a white woman, a white man, and a black man. The interview panel spoke with each of the seven applicants individually, rating their responses to six structured, job-related questions on a scale of 0 to 3. After all of the interviews were completed, the four interviewers ranked the applicants based on their "gut feel," and Edwards scored very highly. Subsequently, the scores assigned to each candidate, based on their answers to the six questions, were tallied. The top three candidates, based on these aggregate scores, were Jim Brown (69 points), Carey Rutledge (62.5 points), and the plaintiff Edwards (61 points). The committee then discussed the three "finalists." One of the interviewers explained that she had reservations about Edwards's job performance in his capacity as a temporary Cable Locator. She said she had frequently seen Edwards in the office socializing and speaking on the phone, while other employees were in the field. Moreover, she felt that Edwards had not performed well in his interview.

The committee recommended not offering the job to the most highly ranked applicant (Brown) because he had expressed doubt that he would accept the job even if it were offered to him. The members of the committee then agreed to recommend that the position be offered to Rutledge, whose aggregate interview score was slightly higher than that of Edwards. Rutledge had previous work experience related to the Cable Locator position, interviewed effectively, and was familiar with the equipment used in the position. Rutledge accepted the offer.

Edwards claims that the reasons GPC advances for offering the job to Rutledge must be pretextual because the hiring manager, Weldon, testified that Edwards was well qualified, because GPC only revealed the job-performance concerns of the committee member in its summary judgment motion, rather than at the earliest stages of discovery, and because Edwards was better qualified for the position than Rutledge.

The relevant issue here, however, is not whom we would determine to be better qualified for the job. *See Elrod*, 939 F.2d at 1470. Again, we do not sit in judgment of the wisdom of an employer's selection. Edwards "cannot . . . establish pretext simply by showing that [he] is more qualified than [Rutledge]. Rather, [Edwards] must adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (*quoting Denney*, 247 F.3d at 1187); *see also Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000). This principle "should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Lee*, 226 F.3d at 1254 (*quoting Deines v. Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999)) (internal quotation marks omitted).

On this record, the evidence is insufficient to raise a genuine issue of fact as to whether GPC's stated reasons for promoting Rutledge instead of Edwards are pretextual. Edwards has not offered evidence showing that he was "so clearly more qualified for the position than [Rutledge] that a reasonable juror could infer discriminatory intent from

the comparison." *Id.* at 1255. Indisputably, Rutledge received a higher aggregate score than Edwards on his interview, Rutledge had relevant job experience and familiarity with the work required of a Cable Locator, and at least one committee member believed that Edwards had adopted an inappropriate demeanor during his interview and had questionable work habits. The evidence was not sufficient to show a disparity between Edwards's qualifications and Rutledge's so great that a jury could infer the committee did not honestly believe Rutledge was more qualified. *See id.*

Moreover, because the plaintiffs' Complaint listed only the Cable Locator position, the district court observed that Edwards was limited to pursuing only that claim. Out of "an abundance of caution," however, the district court addressed several other claims raised by Edwards. It need not have done so. Any claims not asserted in the plaintiff's Complaint are properly dismissed. *See Coon v. Ga. Pac. Corp.*, 829 F.2d 1563, 1568-71 (11th Cir. 1987).[22] Yet even if Edwards had included the remaining three promotion denials in the Complaint, summary judgment still would have been properly granted in favor of GPC, because Edwards did not establish pretext as to any of those employment decisions.

First, Edwards says that he was more qualified than the two white candidates who were offered Operator I

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[22] Furthermore, several of the claims not included in the Complaint, but asserted in discovery, occurred more than 180 days before Edwards filed a complaint with the EEOC. Those claims were, therefore, barred by Title VII's statute of limitations. *See* 42 U.S.C. § 2000e-5(e)(1); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000).

positions in March 2000, but he has failed to demonstrate a disparity between him and them so great that a fact-finder could infer discrimination from the decision not to promote. Moreover, some of the evidence Edwards relied upon is taken from performance evaluations completed after the successful applicants had already begun working in the Operator I positions. Isolated negative comments in these evaluations cannot support an inference that those charged with filling the openings declined Edwards's application because of race.

As for the Operating Service Representative promotion Edwards was denied in June 1999, Edwards claims that the district court erred by basing its decision on "inadmissible hearsay." Appellants' Brief at 69. The alleged hearsay was a statement by a member of the selection committee, David Keenum, that, to his knowledge, the hiring manager, Bob Davidson, chose the white candidate because he believed the white candidate was the best-qualified candidate for the position. Regardless of whether this statement is fairly characterized as hearsay, Edwards failed to present any evidence to challenge GPC's evidence that the successful candidate was hired based on his interview performance and extensive experience related to the position. The successful candidate, Gary E. Miller, was a long-term employee of GPC who had extensive experience in metering and power delivery. He was recommended by the interview committee as one of the most qualified candidates for the Operator Service Representative position Edwards had sought. Moreover, Edwards has not undermined GPC's evidence that his race was unknown during the selection process, rendering untenable the suggestion that he was denied the position because of his race.

Finally, Edwards has not established pretext concerning his failed application for the Power Delivery Supervisor position in February 1999. GPC maintains that Edwards was not selected for an interview because his application did not reflect familiarity with the repair shop operations or any mechanical background. In contrast, the successful candidate, Al R. Kuzava, was the consensus recommendation of the interview committee, having been deemed the most qualified for the position based on his extensive repair shop and mechanical experience, his substantial experience as a journeyman, and his demonstrated leadership skills, all job-related skills identified by the hiring manager, Mark Edward Cawthon, as prerequisites for the job. Our review of the record confirms that the successful candidate had extensive mechanical and repair shop experience, and that Edwards's application lacked any indication that he had familiarity with repair shop operations. Accordingly, Edwards has failed to cast doubt on the legitimate reasons proffered by GPC for denying him the Power Delivery Supervisor position.

In short, we find no reversible error in the decision to grant summary judgment in favor of GPC.

E. Charcella Green

Plaintiff Green contends that she was discriminated against as to both promotion and compensation, and she challenges the district court's entry of summary judgment against her on both claims.[23] We turn, first, to Green's

[23] Green's arguments on appeal are directed to "Southern" and "the defendants," but Green was specifically employed by GPC. Because Green was never an employee of TSC, SCES, or SCS, we again affirm the district court's grant of summary judgment in favor of these

(Continued on following page)

arguments concerning her promotion discrimination claim, stemming from the denial of a Manager of Education Services position in 1998.[24]

The district court determined that summary judgment was appropriate on Green's promotion claim because, having accrued more than two years before this lawsuit was filed, the claim was time-barred. Green maintains, however, that the district court erred in calculating when her promotion claim accrued. The district court also found that the claim failed on the merits. Because we agree that Green's promotion claim was time-barred, we need not reach the merits of her claim.

The district court applied a two-year statute of limitations to Green's Section 1981 promotion claim, determining that, to be timely, Green's claim had to accrue after July 28, 1998. *See* R-303 at 8 (citing *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1546 (11th Cir. 1988)). Green did not contest the applicability of this two-year statute of limitations before the district court or in the briefs submitted to this Court, and therefore has waived any challenge to the district court's use of a two-year limitations period. *See supra* note 19. The limitations period begins to run when the facts that will support a

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defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis is directed to whether summary judgment was properly granted to defendant GPC.

[24] Green offers no arguments as to the entry of summary judgment against her on her claims relating to bonuses or promotions other than the Manager of Education Services position. Accordingly, she is deemed to have abandoned any claims other than those based on compensation and the denial of the education manager position. *See, e.g., Access Now*, 385 F.3d at ___, 2004 WL 2113022, at *6; *Jernigan*, 341 F.3d at 1283 n.8.

claim are apparent, or should be apparent to a person with a reasonably prudent regard for her rights. *See Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998). Therefore, if Green knew or should have known before July 28, 1998 that she had been denied the Manager of Education Services position because of race, her promotion claim was time-barred.

As the district court noted, Green's deposition testimony reveals that she learned in early July 1998 that the educational manager position she had applied for had been given to Pamela Thomas, a white employee. When deposed, Green stated that the position had been filled "either toward the end of June or the first part of July [1998]." R137-R at 254. Green testified that she received a voice mail stating that Ms. Thomas had been hired "about two days" before a performance review that was held on July 15, 1998. *Id.* at 180-82. Green also testified that shortly after finding out Ms. Thomas had been hired, she expressed her concern about not being given the position to administrators at GPC, including the administrators conducting her performance review on July 15, 1998. *Id.* Moreover, Green stated that when she applied for the opening she knew she was the most qualified person for the job, indicating her belief that the successful candidate was, in fact, less qualified. In her deposition, Green also stated that she began to suspect she was a victim of racial discrimination as early as 1996. The two-year limitations period ended at the latest in mid-July 2000, some two weeks before this suit was commenced. Thus, the trial court properly determined that the promotion claim was time-barred.

Green also argues that the district court erred by entering a final order of summary judgment against her on

the compensation claims. Green says she was discriminated against on account of race in that she was paid less than white coworkers who performed similar jobs. To state a *prima facie* case of intentional discrimination in compensation, a plaintiff must establish that (1) she belongs to a racial minority; (2) she received low wages; (3) similarly situated comparators outside the protected class received higher compensation; and (4) she was qualified to receive the higher wage. *See Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992) (compensation discrimination by gender); *MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (compensation discrimination by age). The comparators must perform jobs similar to the plaintiff's; thus, the plaintiff must show that, in her job, she "shared the same type of tasks" as the comparators. *B&B Cash Grocery*, 975 F.2d at 1529.

It is undisputed that Green began working for GPC as an intern in 1983, later becoming a full-time, regular employee and continuing at GPC for several years. In October 1996, while Green was working at GPC's Shenandoah Center, an environmental education center, GPC underwent a corporate restructuring that closed the Shenandoah enter. Green was then transferred to GPC's Community and Economic Development Department ("CEDD"), where she claims she began suffering discrimination in compensation.

After the 1996 corporate restructuring, Green accepted a position as an Education Advisor within the CEDD. She claims she was compensated on less favorable terms than white colleagues who served as Urban Advisors or Community Advisors, positions that Green claims are equivalent to Education Advisor. Indeed, Urban, Community, and Education Advisors are all classified

within the defendants' employment database as "ADO Advisors," but GPC asserts that Urban and Community Advisors are not appropriate comparators because the jobs they perform are notably different from those of Education Advisors. GPC relies on this distinction because it is undisputed that white Community and Urban Advisors are compensated more generously than is Green.

GPC Vice President Rebecca Blalock and CEDD administrator Lamar Norton testified that, during GPC's corporate restructuring, pay grade ranges were set by performing a market review to compare new positions to similar positions in the region. According to Blalock, this survey revealed that the market value of Education Advisors was less than that of Community and Urban Advisors within the CEDD, leading GPC to classify Education Advisors at pay grades E3 to E5, but Community and Urban Advisors at grades E5 to E7. GPC maintains that this distinction justifies the lesser salaries for Green and other Education Services employees, as compared to the Community and Urban Advisors.[25]

There is a substantial question whether Green has established a *prima facie* case of compensation discrimination, because it is not clear that the Community and

[25] Green introduced evidence of a 1996 market survey, the "Hay survey," which she alleges is the survey GPC relied upon in assigning salary grades to the various positions within the CEDD. Because this survey does not mention any ADO Advisor positions, Green maintains that GPC's alleged reliance on a market survey is not credible, and thus that the proffered justification is pretextual. However, the Hay survey was conducted after Green's salary was fixed, and could not have been the survey upon which GPC relied. Indeed, Blalock testified that this was not the survey used in setting the salary grades for Green and her colleagues in the CEDD.

Urban Advisors Green uses as comparators are similarly situated in all relevant respects. *See MacPherson*, 922 F.2d at 774 n.16 ("In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." (emphasis added)). Even assuming, however, that the different Advisors are proper comparators, *see B&B Cash Grocery*, 975 F.2d at 1529, Green has not established that the legitimate reason advanced by GPC for the pay disparity is really a pretext for race discrimination. Green has not demonstrated that GPC's stated reliance on a market survey to classify Education Advisors' salary levels was false or otherwise shown that race discrimination motivated the salary structure. Indeed, when GPC classified Education Advisors in the E3 to E5 pay grade range, all Education Advisors were so classified – including Green and at least two white colleagues.[26] The fact that Green's two white colleagues were paid according to the same scale undermines Green's pretext argument.

In short, as to her compensation claim, Green has failed to introduce sufficient evidence to raise a material question on the issue of pretext.

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[26] In fact, Green was classified at grade E5, the highest possible grade for the Education Advisor position. When Green transferred to the CEDD as an Education Advisor, she retained the E5 grade from her previous position. In contrast, her former supervisor, John Thrasher (a white employee), who also became an Education Advisor after the restructuring, accepted a demotion and salary grade reduction by two levels to retain his employment at GPC. In 1997, Thrasher was transferred from the Education Advisor position to a Community Advisor position.

F. Patricia Harris

P. Harris argues that the district court erroneously entered summary judgment against her on her Section 1981 claim of discrimination in compensation.[27] The district court concluded that, while P. Harris had established a *prima facie* case of compensation discrimination, she failed to raise an issue of fact concerning the legitimate reasons the defendants offered to explain the differences in her salary and those of her white colleagues. We agree.

P. Harris began working for GPC in June 1990, when she was offered a Secretary III position on a contract basis. She became a full-time, regular GPC employee on July 1, 1991, when she accepted a Senior Secretary position. Between 1993 and 1997, P. Harris worked for GPC as a Research Analyst in the Competitve Intelligence Department, before taking a job as an Economic Development Analyst in the Economic Research Department.

In the summer of 1997, P. Harris applied for a position as Market Research and Support Analyst in the Atlanta, Georgia offices of SCS. She contends that she was discriminated against when, on account of race, her manager at SCS set her salary at an artificially low level as compared

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[27] P. Harris offers no arguments relating to the district court's entry of summary judgment against her on her promotion and training and support claims. As a result, she is deemed to have abandoned all claims other than her Section 1981 compensation claim. *See, e.g., Access Now*, 385 F.3d at ___, 2004 WL 2113022, at *6; *Jernigan*, 341 F.3d at 1283 n.8.

with salaries of white colleagues performing similar work.[28]

When P. Harris interviewed for the Analyst position at SCS, she met with an interview committee and also had an individual meeting with the Marketing Research Department's manager, Charles Plunkett. Because P. Harris lacked education or experience in marketing, the interview committee recommended against hiring her; Plunkett, however, overrode the committee's recommendation and chose to offer P. Harris the Analyst position. Plunkett testified that, owing to P Harris's lack of experience and marketing education, he would ordinarily have offered her an entry level position as a Market Research and Support Analyst II. However, based on P. Harris' salary grade at GPC, hiring her as an Analyst II would have precluded giving her a raise, presumably one reason she had desired to transfer to SCS. As a result, Plunkett chose to select P. Harris as an Analyst I, placing her in a higher salary grade than her position at GPC. In doing so, Plunkett awarded P. Harris an 8% raise in this new position, which was his understanding of the maximum pay increase that an employee transferring from GPC could receive.[29] P. Harris continued to

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[28] Because P. Harris was never an employee of TSC or SCES, and was no longer an employee of GPC during the timeframe relevant to this appeal, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis evaluates whether summary judgment was properly granted with respect to defendant SCS.

[29] The 8% raise P. Harris received brought her salary from $ 39,432 annually to $ 42,587 annually. Notably, P. Harris never questioned this figure, asked for a higher salary, or gave Plunkett any reasons why her compensation should be more favorable.

receive substantial salary raises during her tenure at SCS.[30]

In spite of the raises she received, P. Harris maintains that she suffered discrimination in compensation in that her salary still was lower than those paid to white co-workers performing the same tasks. The district court concluded that three white employees were valid comparators: John Page, Darin Klein, and Rebekah Golden. All three employees were paid higher salaries than P. Harris, and we agree with the district court that P. Harris successfully established a *prima facie* case of compensation discrimination. However, SCS offered legitimate, non-discriminatory explanations for the pay disparities – that P. Harris did not have either the professional experience or formal education of Page, Klein, and Golden, could not therefore perform her job as efficiently or independently, and was thus less valuable to the department. The district court concluded that P. Harris had failed to rebut these reasons and had not established that the proffered reasons were pretext.

On appeal, P. Harris contends that the district court erred because she had, in fact, established pretext as to Page and Golden.[31] However, on this record we cannot find "such weaknesses, implausibilities, inconsistencies,

[30] For example, less than a year after her promotion to the Analyst I position at SCS, P. Harris received a 4.2% merit raise. A year later, in March 1999, she received a 4.9% raise. In addition, P. Harris received the highest percentage incentive bonus in her department, 15%.

[31] Apparently conceding that the superior qualifications of Klein provided a legitimate, non-discriminatory reason for Klein's higher salary, P. Harris offers no argument on appeal using Klein as a comparator. Indeed, Klein possesses master's and doctorate degrees from the University of Pennsylvania, specializes in communications and research, and had professional experience in market research.

inco-herencies, or contradictions in [SCS's] proferred legitimate reasons . . . that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (citation and internal quotation marks omitted). P. Harris's own contention that she was equally qualified and experienced does not create an issue of fact.

P. Harris holds a master of business administration degree from the DeVry Institute and had worked for GPC for six years prior to taking the Analyst I position at SCS; she maintains that she gained relevant marketing experience at GPC. Golden possessed a bachelor's degree and had six years of market research experience before joining SCS, in which she held marketing positions including Project Director of Marketing, Supervisor of Marketing Research, and Marketing Research Coordinator for Cox Communications. Page had limited work experience, having worked as a Market Research Management intern with BellSouth Communications for six months, but held a bachelor's degree in business and marketing as well as a master's degree in marketing research from the University of Georgia, one of only a few universities to offer an advanced degree in market research.

Both Golden and Page were external hires, unlike P. Harris, who was an internal transfer from GPC. Plunkett testified that he considered different criteria in hiring Golden and Page, who were hired in tight labor markets in which new employees could command more competitive compensation packages. According to Plunkett, when Golden was hired, her extensive marketing experience allowed her to perform more efficiently than P. Harris; Golden was able to work with minimal supervision and was given more responsibility than P. Harris.

Similarly, while Page lacked Golden's extensive experience, Plunkett testified that Page's training at the University of Georgia made him well-prepared to take on extensive market research tasks. Plunkett also stated that he believed a candidate with Page's education could develop more rapidly than an employee like P. Harris, who lacked the training, and could also help SCS attract additional graduates from the University of Georgia's graduate program in Market Research. According to Plunkett, Page's valuable educational experience allowed him to work independently and take on significant responsibilities.

The plaintiff contends that her master's degree from the DeVry Institute and six years of marketing experience at SCS, much of which was spent effectively in on-the-job training, were equivalent to the qualifications of Page and Golden. However, Plunkett offered legitimate explanations for why the educational and work experiences of Page and Golden were more valuable to him as their manager.

P. Harris's assertion that she deserved to earn the same salary as these employees does not render Plunkett's stated explanations unworthy of credence or otherwise raise any genuine issue of fact. As we have observed, we do not "sit as a super-personnel department that reexamines an entity's business decisions." *Elrod,* 939 F.2d at 1470 (citation and internal quotation marks omitted). In the absence of any other evidence that Plunkett's compensation decisions were motivated by race, we conclude that the district court did not err in granting summary judgment in favor of SCS.

G. Sarah Jean Harris

S.J. Harris also claims that the district court erred by granting summary judgment for the defendants on her claims of discrimination in compensation and unlawful retaliation.[32] The district court concluded that because of S.J. Harris's unique disciplinary history, the comparators she used to establish a *prima facie* case of compensation discrimination were not similarly situated, and that even if S.J. Harris had been able to establish a *prima facie* case, she failed to show that the proffered legitimate reasons for her compensation were pretextual. The district court also determined that S.J. Harris failed to show pretext as to the legitimate reason offered to explain her termination: that she was fired because, while on disciplinary probation, her job performance deteriorated and she falsified a company document. But Harris contends that a material issue of fact still remains as to whether the proffered reasons were a pretext for racial discrimination.

GPC hired S.J. Harris as a General Clerk in 1979, and her employment was terminated on August 24, 2000, approximately a month after this case was filed.[33] From 1997 until her firing, S.J. Harris worked in Duluth, Georgia as a Region Support Representative, a customer

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[32] S.J. Harris offers no argument on appeal relating to her promotion discrimination claim, and is therefore deemed to have abandoned any promotion claims. *See, e.g., Access Now*, 385 F.3d at ___, 2004 WL 2113022, at *6; *Jernigan*, 341 F.3d at 1283 n.8.

[33] S.J. Harris was never employed by, nor did she ever apply for a position with defendants TSC, SCES, or SCS. Accordingly, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis is directed to whether summary judgment was properly granted to defendant GPC.

service position in GPC's Gwinnett Region. It is undisputed that, while she held this position, S.J. Harris received poor performance evaluations and was eventually subjected to formal discipline. In evaluating S.J. Harris's job performance in 1997, her supervisor, Hugh Walters ("Walters"), noted concerns relating to S.J. Harris's personal use of the telephone, as well as her punctuality, cooperation, teamwork, and communications with coworkers. Similar concerns were also expressed in S.J. Harris's evaluation for 1998, and S.J. Harris received ratings of "Unsatisfactory" or "Needs Improvement" in all categories on her mid-year 1999 evaluation.

Because of concerns about her job performance, S.J. Harris was placed in GPC's Positive Discipline program in mid-1999. GPC's disciplinary program prescribed formal processes designed to improve employee performance: at level one, S.J. Harris received the "Oral Reminder" about her work goals, and at level two she received the "Written Reminder" laying out the improvements she needed to make. When her job performance did not show sufficient improvement, S.J. Harris was placed in the final level of discipline, the "Decision-Making Leave" ("DML"). S.J. Harris's placement on DML occurred on October 7, 1999, at which time she was given a day off to decide whether she wished to leave GPC, or to return and redouble her efforts to improve her job performance. GPC employees placed on DML status are informed that if any disciplinary action occurs within 18 months after placement on DML, then the employee will likely be fired.

After returning to work, S.J. Harris showed some improvement in her performance during the later part of 1999 and the first months of 2000. However, GPC has offered uncontroverted evidence that in July and August

2000, Walters received complaints about S.J. Harris both from customers and co-workers, including complaints that her personal telephone usage had again increased, and that she was not completing assignments in a timely fashion. In addition, Walters received several complaints about delays for service orders that S.J. Harris oversaw. The plaintiff has not offered any evidence challenging GPC's assertion that much of her work in this time period suffered from various errors.

S.J. Harris argues, however, that this evidence must be pretextual, because an evaluation she received just before her termination in August 2000 failed to refer to these performance issues. Indeed, GPC acknowledges that S.J. Harris's performance improved somewhat in late 1999 and during the first part of 2000. But the problems that GPC maintains led to Harris's firing occurred in July and August 2000, while the performance evaluation covered only the period from January to June 2000, thus explaining why the disciplinary issues of July and August were absent from the evaluation.

According to GPC, the event that actually precipitated the firing occured in late August 2000. On August 22, 2000, Walters learned that an engineer, Keith Thomas ("Thomas"), received a work order from S.J. Harris that day, which Thomas believed had originally been filed with S.J. Harris on August 16, 2000. After speaking with Thomas and his supervisor, Walters concluded that S.J. Harris had falsified a computer entry to make it appear as if she had given Thomas a work order on August 16th, when in fact she had failed to do so until August 22nd. Walters conferred with other administrators and concluded that because of S.J. Harris's DML status, the decline in her performance in the summer of 2000, and her

falsification of the computer entry, her employment should be terminated. S.J. Harris was fired on August 24, 2000.

We turn, first, to S.J. Harris's argument that the district court erred by entering summary judgment for GPC on her retaliation claim. To establish a *prima facie* showing of retaliation under Title VII, "the plaintiff must show (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relation between the two events." *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994).

Here, the first two elements are not in dispute, and S.J. Harris established a *prima facie* case of retaliation because the delay between the filing of the lawsuit and her firing was so brief. *See Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (explaining that "close temporal proximity" may be sufficient to establish causal relation in retaliation cases). However, GPC may rebut the *prima facie* case by offering a legitimate, non-discriminatory reason for S.J. Harris's termination. GPC has done so by maintaining that S.J. Harris was fired because of the speedy and substantial decline in her job performance during the late summer of 2000, and because of her manager's good-faith belief that she had falsified a computer entry.

After review of the record, we are satisfied that the district court properly concluded that Walters honestly believed Harris had falsified the record. The relevant issue here is not whether Harris actually falsified the entry, but rather whether Walters honestly believed Harris falsified the entry. *See Elrod*, 939 F.2d at 1470; *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000). The

record reflects that on August 22, 2000, S.J. Harris printed a service order and provided it to Thomas. On the same day, she made a computer entry stating that she had given the order to Thomas on August 16, 2000. GPC introduced evidence that Walters conferred with Thomas and his supervisor about the incident, examined the document in question, and honestly believed S.J. Harris had falsified the document. Because she was in the final stage of disciplinary probation and had been the subject of numerous complaints, S.J. Harris was terminated for this incident. She has introduced nothing to rebut this evidence, and therefore, she has not raised a genuine issue as to pretext. Accordingly, we discern no error in the district court's grant of summary judgment on the retaliation claim.

Next, S.J. Harris claims that she was discriminated against in compensation in that she was paid less than white employees in similar positions. Notably, S.J. Harris does not dispute that her disciplinary record was distinguishable from those of the alleged comparators she identifies. Indeed, from 1997 to 1999, and again in July and August 2000, S.J. Harris had a demonstrably poor job performance. S.J. Harris does not dispute that her performance evaluations were negative, or that she was disciplined in 1997 and 1998 for making excessive personal phone calls and habitual tardiness. Moreover, in 1998, two of S.J. Harris's job responsibilities were withdrawn because of performance issues, and in her 1999 evaluation, S.J. Harris's supervisor noted that she remained unable to return from lunch on time and continued making too many personal calls.

In spite of her disciplinary history, S.J. Harris alleges discrimination in that she was paid less than co-workers

Barron and Collett. But these comparators had no record of disciplinary problems. Neither was placed in GPC's Positive Discipline program, let alone on DML status. In fact, S.J. Harris was the only Customer Service employee in the Gwinnett Region to be placed on DML status. GPC's annual merit pay increases and bonuses are related to performance, and the difference in performance evaluations between Harris and Barron and Collett renders the latter two inappropriate comparators. *See MacPherson*, 922 F.2d at 774 n.16. Finally, Collett worked as an Operating Assistant, a job one level higher than S.J. Harris's, further diminishing her value as a comparator. Again, the district court did not err in entering summary judgment against S.J. Harris on her compensation claim. *See Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1313 (individuals lacking disciplinary and performance issues of plaintiff were inappropriate comparators), superseded in other part by 151 F.3d 1321 (11th Cir. 1998).

H. Irene McCullers

McCullers contends on appeal that the entry of summary judgment in favor of the defendants on her promotion and compensation claims was error. McCullers maintains that she established a *prima facie* case of discrimination in promotions and compensation and raised a genuine issue of material fact as to whether the defendants' stated justifications were pretextual. Specifically, McCullers claims that she was discriminated against by being denied a progressive promotion from Processing Operator I to Processing Operator Senior, and that she was paid less than similarly situated white co-workers.

McCullers began working as a file clerk for GPC in 1978, and transferred to SCS in January 1997.[34] When McCullers first transferred to SCS, she received the job title of Computer Operator I. At SCS, McCullers worked with, among others, three white colleagues, Mildred Brune ("Brune"), Shirley Keen ("Keen"), and Faye Starbird ("Starbird"). Brune, Keen and Starbird all had at least six more years of experience inside the defendant companies than did McCullers.

When the department in which McCullers and her white colleagues worked was reorganized in 1999, McCullers's job title was changed to Processing Operator I. Brune and Keen were also reclassified as Processing Operators I, while Starbird's job title was changed to Processing Operator II. In May 1999, Starbird was promoted to Processing Operator I, and in March 2000, Brune was promoted to Processing Operator Senior. McCullers was

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[34] McCullers was never employed by, nor did she ever apply for a position with defendants TSC or SCES. Accordingly, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18.

In addition, while McCullers did work for GPC between 1978 and January 1997, her employment at GPC occurred more than two years prior to the filing of this lawsuit. As we have explained, *see supra* note 19, the district court applied a two-year statute of limitations to the plaintiffs' claims, and because McCullers did not raise any objection to the two-year limitations period applied by the district court below or in her initial briefs, she is deemed to have waived any argument that a longer limitations period applies. *See Padilla-Reyes*, 247 F.3d at 1164 ("Because this issue is raised for the first time in supplemental briefing, we deem it waived."). Accordingly, we affirm the district court's grant of summary judgment in favor of defendant GPC. The remainder of our analysis relating to McCullers's claims, therefore, is devoted to the final summary judgment entered in favor of defendant SCS.

never promoted from Processing Operator I to Processing Operator Senior.

McCullers alleges that she was discriminated against in promotions when SCS refused to promote her to Processing Operator Senior, as it did with Brune. SCS responds that McCullers was less qualified for the promotion than was Brune. SCS maintains that Brune's work performance consistently exceeded expectations, while McCullers's did not, in large part because of problems with work attendance and tardiness. McCullers also contends that she was discriminated against in compensation in that she was paid less than Brune, Keen, and Starbird. SCS argues, in turn, that McCullers was paid less than these co-workers because McCullers lacked the seniority of her colleagues.

We turn first to McCullers's claim of promotion discrimination. The district court concluded that McCullers had failed to establish a *prima facie* case of promotion discrimination because she had not established elements two or four of the appropriate test, which required McCullers to prove that (1) she was a member of a protected class; (2) she applied for and was qualified for a promotion; (3) she was denied the promotion; and (4) a similarly situated white employee instead received the promotion. *See, e.g., Denney*, 247 F.3d at 1183; *Lee*, 226 F.3d at 1253; *Taylor v. Runyon*, 175 F.3d 861, 866 (11th Cir. 1999).

McCullers argues that the district court erred by misconstruing the fourth element of the *Denney* test for discrimination in promotion. McCullers contends that the district court erroneously required McCullers to show that a similarly situated white employee was promoted over

McCullers specifically, and that this ruling was wrong "because no 'promotion over the plaintiff' requirement exists" under *Denney*. Appellants' Brief at 51. First, *Denney* did not involve a non-competitive (progressive) promotion like the one that McCullers was denied, and the district court also cited *Harris v. Secretary, U.S. Department of the Army*, 119 F.3d 1313, 1321 (8th Cir. 1997), a case that did involve a progressive promotion like the one at issue for McCullers. But we need not determine whether the district court's gloss on the fourth element under *Denney* was inaccurate, since we agree with the district court that McCullers failed to establish the second element – that she was qualified for the promotion in question.

The record demonstrates that promotion from Processing Operator I to Processing Operator Senior required an employee's performance to consistently meet and exceed expectations. McCullers contends that during the relevant period, SCS consistently ranked her job performance as a four, on a five-point scale, and that this ranking indicates that she met and exceeded expectations. However, McCullers's personal opinion that being ranked as a four meant she exceeded expectations is insufficient to establish her qualification. *See Holifield*, 115 F.3d at 1564 (explaining that a plaintiff's "opinion, without more, is not enough to establish a *prima facie* case").[35]

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[35] Moreover, even the document that McCullers relies on to establish that a four ranking demonstrates her qualification undercuts her case: this document states that employees in the fourth category "consistently meet and frequently exceed[ ] . . . expectations," while it is only employees in the fifth category who "consistently exceed[ ] performance objectives." R262-18. As the district court observed, McCullers "has never met Defendants' job assessment criterion of 'meets and

(Continued on following page)

Indeed, in contrast to McCullers's own self-assessment, her managers have maintained that her performance "was viewed as average – she was not a consistently strong performer – she did not consistently perform at a level that met and exceeded the expectations of her job." R200 at 11; *see also id.* at 21.[36] The only evidence McCullers has proffered to support her qualification is her own opinion, while all the other record evidence supports SCS's position that McCullers was not qualified for the promotion to Processing Operator Senior. The district court did not err in concluding that McCullers had failed to establish a *prima facie* case of promotion discrimination.

As for McCullers's compensation claim, the district court determined that McCullers failed to establish a *prima facie* case of discrimination because she did not identify a proper comparator. The three employees McCullers argues are valid comparators – Starbird, Brune and Keen – all had more than six years of seniority over McCullers. Seniority may constitute a legitimate, non-discriminatory justification for differences in compensation. *See, e.g., Irby v. Bittick*, 44 F.3d 949, 956 & n.10 (11th

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exceeds expectations' although she has always been found to 'meet expectations.' Under Defendant's policy, this is not enough for a progressive promotion." R300 at 14.

[36] Indeed, the defendants have submitted multiple exhibits – including performance assessments, employee development materials, and skills assessments – which identify various areas in which McCullers's managers felt she needed improvement. Her managers expressed concerns regarding McCullers's work habits, including long lunches, arriving to work late, and taking excessive sick time, and generally rated her skills in the middle, rather than the upper, range of the assessment scale. *See, e.g.*, R137-96; R137-100; R137-105; R137-112; R137-118.

Cir. 1995); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 599 (11th Cir. 1994). Because McCullers failed to identify any comparators with similar levels of seniority, she has failed to establish a *prima facie* case of discrimination in compensation. The district court did not err in entering summary judgment against McCullers.

I. Carolyn Wilson

Finally, the plaintiff Wilson argues that the district court erred in granting summary judgment for the defendants on her promotion and discrimination claims. Wilson maintains that the court erred by determining that she had failed to show that the proffered legitimate, non-discriminatory reasons for denying Wilson a promotion were pretextual. Wilson also finds error in the district court's conclusion that she failed to make a *prima facie* case of compensation discrimination because she did not identify any proper comparators.

Wilson began working for GPC in 1985, but in late 1997, she applied for and received a position within the Finance Center of SCES in Atlanta.[37] Wilson began working in this position in February 1998. The hiring manager for the opening at SCES, Karla Fuller ("Fuller"), listed a descriptive job title of the position as "Finance Center

[37] Wilson was never employed by, nor did she ever apply for a position with defendants TSC or SCS. Accordingly, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. Moreover, while Wilson did work for GPC for a dozen years, her employment at GPC ended before the statutory period relevant to this lawsuit. Accordingly, we affirm the district court's grant of summary judgment in favor of defendant GPC. The remainder of our analysis is devoted to the summary judgment entered in favor of defendant SCES.

Supervisor," although the offer letter Wilson received referred to the job as "Project Analyst Senior," an exempt level two position. Wilson's job performance in the Finance Center Supervisor merited several raises: she received percentage increases in salary in November 1998, March 1999, and March 2000, and also repeatedly received incentive awards and bonuses of as much as 20% of her salary.

In November 1999, Wilson applied for a position as Business Analyst II with SCES. Fuller was the hiring manager for this position, too, and the successful candidate would be supervised by Fuller as well. The preferred qualifications for the Business Analyst II position included the ability to start the job with minimal training and supervision; a bachelor's degree in finance, management, or accounting; experience in the construction industry; good oral and written communications ability; and familiarity with the Excel software program. Although Wilson did not have experience in construction or the preferred type of bachelor's degree, Fuller nevertheless selected Wilson for an interview.

Although Fuller interviewed Wilson for the Business Analyst II position, the job was ultimately offered to a white woman, Sarah McFall. Fuller suggested that both Wilson and McFall were qualified for the Business Analyst II job, but McFall had a bachelor's degree in accounting, unlike Wilson, and had limited work experience in the construction industry, again unlike Wilson. SCES maintains that Fuller – as the hiring manager and supervisor for the position – honestly believed that McFall was better qualified for the job than Wilson and would be able to perform with little training or supervision.

As the district court concluded, Wilson successfully established a *prima facie* case of promotion discrimination by proving that she was qualified for the promotion and that the position was offered to McFall, a white woman. *See, e.g., Denney*, 247 F.3d at 1183; *Lee*, 226 F.3d at 1253. However, the district court also concluded that Wilson had not established pretext as to the legitimate reason proffered to explain denying Wilson the promotion – that Fuller, the hiring manager, sincerely believed that McFall was better qualified.

Wilson's essential argument as to Fuller's conclusion that McFall had superior qualifications is that the asserted belief must be pretextual, because Wilson herself believes she was better qualified. But whether we could conclude Wilson was better qualified than McFall is not the issue here. *See Elrod*, 939 F.2d at 1470. As we have already explained, a plaintiff cannot establish pretext simply by showing that she is more qualified than the successful applicant. Rather, for Wilson to establish pretext, she would have to "adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield*, 267 F.3d at 1268 (*quoting Denney*, 247 F.3d at 1187). It is undisputed that Wilson lacked the educational credentials that McFall possessed, and that, unlike Wilson, McFall had at least minimal construction industry experience.

As the supervisor and hiring manager for the vacant Business Analyst II position, Karla Fuller was in a unique position to determine that McFall was better qualified, since Fuller knew the specific job requirements of the position, had supervised Wilson, and was intimately familiar with Wilson's skills and qualifications. On this

record, we cannot say that any disparity in qualifications rises to the necessary level of obviousness.

As for Wilson's compensation claim, the district court concluded that summary judgment was appropriate because Wilson failed to establish a *prima facie* case. Specifically, Wilson failed to identify a similarly situated comparator. On appeal, Wilson asserts not only that she was paid less than similarly situated white employees, but also that white employees occupying "lower" positions were paid more generously. However, Wilson has not established that the proposed comparators had similar levels of experience or education, nor has she established the comparators' job responsiblities with any particularity. Wilson's assertion that these individuals were "lower" employees is offered in a wholly conclusory manner, based on her own subjective belief. As a result, Wilson's argument fails. *See Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1989); *see also Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990) (collecting cases). The district court's entry of summary judgment was appropriate here, too.

IV.

In sum, we are persuaded that the district court did not err in any of its determinations, and, accordingly, affirm its judgments in all respects.

AFFIRMED.

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1317; 2003 U.S. Dist. LEXIS 5890

March 31, 2003, Decided March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Charcella Green. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed except as indicated otherwise. Plaintiff first began working for Defendant Georgia Power Company ["GPC"] in 1983, first as an intern, then as a regular full-time employee. In 1986, Plaintiff accepted a position with GPC as a Corporate Communications Representative and became a Senior

Corporate Communications Representative in 1987. In 1990, GPC rotated Plaintiff into the position of Assistant to the Director of Corporate Communications. In late 1991, Plaintiff moved into the GPC Educational Services Department and later was assigned to work at GPC'S Shenandoah Center, an environmental education center sponsored by GPC, under the management of Director John Thrasher. Plaintiff Dep. I at 99.

In October of 1996, GPC underwent a massive corporate reorganization and, in conjunction with that reorganization, closed GPC's Shenandoah Center. All four full-time employees who worked at the Shenandoah Center lost their positions. Plaintiff and John Thrasher were transferred to GPC's Community and Economic Development Department,[1] while the other two employees were separated from the company. Specifically, Thrasher lost his management title and accepted a position with GPC as an Education Advisor, a position two pay grade levels below the level he held while working as Director of the Shenandoah Center. Other GPC employees also suffered one- or two-level pay grade reductions through the 1996 reorganization. Conversely, although Plaintiff also transferred to GPC's Community and Economic Development Department as an Education Advisor, she suffered no pay grade reduction.

Plaintiff continues to hold the Education Advisor position today. Plaintiff holds the pay grade level of Exempt Level 5, which Defendants allege is the highest

[1] Apparently, the current Community and Economic Development Department was known as the Area Development Organization at the time of 1996 reorganization.

possible pay grade for her position as Education Advisor. As an Education Advisor, Plaintiff works within the Education Services Department, which is a subdivision within the Community and Economic Development Department. Plaintiff Dep. II at 106-07. The primary functions of the Community and Economic Development Department are to increase revenues, strengthen community relationships, and increase company branding for GPC. *Id.* at 109; Norton Dep. 31-32. The Education Services subdivision develops relationships with educational groups. *Id.* at 116. Plaintiff spends the majority of her time building relationships with state education leaders. *Id.* at 116-21.

Plaintiff applied for an EEO Coordinator position with Defendant Southern Company Services ["SCS"] in 1999.[2]

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[2] Defendants The Southern Company ["TSC") and Southern Company Energy Solutions, Inc. ("SCES"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCES. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned her claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[ ] who receive[s] compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it

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Plaintiff did not note this promotion application in her complaint and did not refer to it in her discovery responses until January of 2000 because she "forgot about it." Plaintiff Dep. II at 27-28; Plaintiff's Second Am. Interr. Resp. at 3.

Plaintiff believes that GPC began to discriminate against her in terms of her compensation in 1996 when she transferred to the Community and Economic Development Department. James Lovett, John Perryman, Clinton Taylor, Stewart Rodeheaver, and John Thrasher[3] currently work as Community ADO Advisors in the Community Development and Economic Development Department. Myles Smith, James Vaseff, and Steve Foster currently serve as Urban Affairs ADO Advisors. From July of 1998 to July of 2000, Lovett, Perryman, Taylor, Rodeheaver, Thrasher, Smith, Vaseff and Foster reported directly to Lamar Norton.

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can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC and SCES.

[3] Thrasher was transferred to the Community Advisor position in 1997. Thrasher Dec. P 10.

According to Defendants, GPC employees' individual pay increases are determined by the employees' performance and their placement within the pay grade salary range for their position.

This lawsuit was filed on July 27, 2000; Plaintiff joined as a named party when the Second Amended Complaint was filed on August 14, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against her by paying her less than her white co-workers and by improperly denying her promotions.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[4] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both of Plaintiff's intentional discrimination claims.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

[4] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice

claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Individual Disiparate Treatment

Promotion Discrimination

The Court determined in the order denying class certification that Plaintiff has standing to pursue only a claim of compensation discrimination under 42 U.S.C. § 1981. *Cooper v. Southern Company*, 205 F.R.D. 596, 606 (N.D.Ga. 2001). This ruling was based on the facts alleged by Plaintiff at the time the certification issue was decided and the statute of limitations applicable to her claims. Defendants argue that they are therefore entitled to summary judgment on Plaintiff's claims with respect to promotion discrimination. Plaintiff argues in response that she has valid promotion claims with respect to one position: Manager of Education Services, for which she applied in 1998. Plaintiff cannot establish a claim based on this position.

Plaintiff's claims are barred to the extent they relate to alleged events occurring more than two years prior to the filing of this suit. *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1546 (11th Cir. 1988) (applying a two year statute of limitations to § 1981 claims). This lawsuit was filed on July 27, 2000; therefore, Plaintiff's

claims must be based on events occurring after July 28, 1998.[5]

Under federal law, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998); *Calhoun v. Ala. Alcoholic Control Bd.*, 705 F.2d 422, 425 (11th Cir. 1983). Plaintiff argues that her claim with respect to the Manager position is timely because she did not learn that the position had been filled by a "less qualified" white applicant until August 1998. To support this argument, Plaintiff testified in an affidavit as follows:

Thomas did not assume the Manager position until August of 1998.

> I was unaware that a less-qualified Caucasian was awarded the Manager position instead of me until August of 1998 when Thomas assumed the Manager position.

Plaintiff Aff. PP 67-68.

However, this evidence conflicts with Plaintiff's prior deposition testimony indicating that she was aware by

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[5] Plaintiff argues that she can assert any claim arising within two years preceding July 18, 2000, the date on which Tracey Isom filed an EEOC charge alleging class-wide race discrimination. The Court rejects this argument. Tracey Isom is not a party to this lawsuit and Plaintiff has failed to demonstrate how Isom's EEOC charge is relevant to these proceedings. Further, even if the EEOC charge were relevant, it would only provide Plaintiff with standing to pursue claims arising 180 days before such charge was filed.

early July 1998 that the position had been filled by Pam Thomas.

> Q: Now, when Ms. Page [Thomas's predecessor) went out on maternity leave, . . . she told people she had planned to come back, correct?
>
> A: Uh-huh, that is correct.
>
> Q: So you didn't know there was going to be a vacancy until she came back and worked for a while and said, I'm quitting for good?
>
> A: That is correct.
>
> Q: And that was in approximately August of '98, right?
>
> A: No, that was in June of '98.
>
> Q: June of '98?
>
> A: Uh-huh.
>
> Q: And then when was the position refilled by Ms. Thomas?
>
> A: It was either toward the end of June or the first part of July, I don't remember.

Plaintiff Dep. I at 253-54. Plaintiff also testified that she discussed her failure to obtain the promotion during her performance review held "about two days" after she learned that Thomas had been awarded the position. *Id.* 180-82.

> Q: How did you find out that Ms. Thomas had gotten the job?
>
> A: I got a voice mail.
>
> Q: From who?

A: Lamar Norton.

Q: And what did the voice mail say?

A: That Pam Thomas had been awarded the position as manager of educational services.

Q: Did you speak to anybody after that about the fact that she had been promoted?

A: Yes, I did.

Q: Who did you talk to?

A: I talked to several people.... About two days after Pam Thomas got that job, I had my review with Mary Page and Lamar Norton.

Id. This performance review was held on July 15, 1998. Plaintiff Aff., Ex. BB.

When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Van T. Junkins and Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984). Plaintiff does not explain the discrepancy between her deposition and affidavit testimony. Therefore, Plaintiff's deposition testimony will control where Plaintiff's affidavit testimony is expressly contradicted. *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 663 (N.D.Ga. 2001). Plaintiff's deposition testimony clearly establishes that she was aware that Thomas had been awarded the position sometime in early to mid-July 1998. Accordingly, the statute of limitations for any claim based on that employment decision began to run before July 28, 1998, rendering any such claim untimely.

Plaintiff argues in the alternative that the statute of limitations should be equitably tolled because Defendants allegedly misled Plaintiff by claiming the company would investigate whether she was discriminated against but denied Plaintiff any information about such investigation. "Tolling is an extraordinary remedy which should be extended only sparingly." *Justice v. U.S.*, 6 F.3d 1474, 1479 (11th Cir. 1993). According to Plaintiff, after learning that she had been denied the position, she contacted the Defendants' EEO office and requested an investigation into the denial. Plaintiff further claims that she never received any information about an investigation, including whether an investigation was ever conducted. Plaintiff argues that she was thus unable to determine whether the selection process was fair "until Thomas assumed the position in August." Plaintiff's Response at 6.

This argument does not justify the tolling of the statute of limitations. First, Plaintiff's deposition testimony contradicts her assertion that she did not learn until August that Thomas had been awarded the job. Further, Plaintiff's allegations that Defendants did not share any information with her about an investigation do not provide a basis for the "extraordinary" remedy of tolling. Plaintiff provides no evidence other than her affidavit testimony with respect to whether an investigation was ever conducted or even as to whether she actually made such request. Assuming, however, that such request was made, Plaintiff has pointed to no evidence that Defendants withheld any information from her or otherwise discouraged her from filing suit. Based on Plaintiff's own assertions, she knew at least from August 1998 of the facts upon which this claim is based but failed to pursue the claim for almost two years. That Plaintiff did not have all

of the evidence she would need to succeed on her claim when she first became aware of these facts does not justify tolling. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 n.19 (11th Cir. 1993).

However, even if the claim was timely, Defendants are also entitled to summary judgment on the merits of the claim. Defendants do not dispute that Plaintiff would be able to establish a prima facie case of promotion discrimination but contend that Plaintiff was not hired because the successful candidate was better qualified for the position than Plaintiff. Norton Dep. 89-90. Plaintiff does not address this asserted non-discriminatory reason for the decision.[6]

However, Plaintiff has provided statistical evidence of racial imbalances in Defendants' promotion and compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the promotion and compensation of black employees relative to white employees, are evidence from which a reasonable factfinder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . .

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[6] Instead, Plaintiff argues that Defendants failed to offer a justification for denying Plaintiff the position. Plaintiff's Response to Defendants' Motion for Summary Judgment at 6, 11.

that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support her individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which she worked or the positions which she challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education, and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977) (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).[7]

Because Plaintiff has failed to establish pretext with respect to Defendants' asserted reason, Defendants are entitled to summary judgment with respect to this claim. *See Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000); *Combs*, 106 F.3d at 1529.

Other Positions

In the complaint, Plaintiff alleged that she had been discriminated against when she was denied the following

[7] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

positions: Community Advisor, Manager of Education Services in 1996, the managerial position currently held by Christy Terrell, the managerial position currently held by Rick Kimball, and Assistant Vice President of Government and Regulatory Affairs. Third Amended Complaint PP 109-113. With respect to managerial positions held by Terrell and Kimball, Defendants argue that Plaintiff cannot establish a claim because she did not apply for these jobs. With respect to the EEO Coordinator position, Defendants argue that Plaintiff was not awarded the position because she did not possess the appropriate qualifications. With respect to the Assistant Vice President position, Defendants argue that Plaintiff cannot establish a discriminatory promotion claim because she never applied for the position. Plaintiff has failed to respond specifically to Defendants' motion for summary judgment with respect to any promotion claim other than the Manager of Education Services position for which she applied in 1998. Defendants are therefore entitled to summary judgment with respect to these other positions. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's promotion claim.

Compensation Discrimination

Plaintiff also claims that Defendants discriminated against her by paying her less than similarly situated white employees. Defendants first argue that this claim is barred by the statute of limitations because Plaintiff was aware of the allegedly discriminatory acts outside the statutory period. As noted above, "claims of discrimination

accrue when the plaintiff is informed of the discriminatory act." *Everett,* 138 F.3d at 1410. Defendants contend that Plaintiff should have filed her claim within two years of the 1996 corporate reorganization, based on Plaintiff's testimony that she first began to believe that she was discriminated against with respect to pay at that time. Plaintiff Dep. II at 125-26; 131-32. In response, Plaintiff contends that her claim is not barred because compensation discrimination constitutes a continuing violation bringing her claim within the statute of limitations. The Court of Appeals for the Eleventh Circuit has held that "race based, discriminatory wage payments constitute a continuing violation of Title VII." *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 449 (11th Cir. 1993) *see also Bazemore v. Friday*, 478 U.S. 385, 395, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986). Because Plaintiff remains employed by Defendants and apparently contends that the alleged compensation discrimination continues, her claim is timely.

To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case). Defendants do not dispute that Plaintiff is a member of a protected class or that she received low wages but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay.

"In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Defendants contend that Plaintiff's only valid comparator is Plaintiff's white co-worker, Elise Hare. Hare, a white female, holds the same position as Plaintiff – Education Advisor – but, according to Defendants, earns approximately $ 10,000 less than Plaintiff. In response, Plaintiff argues that eight of her white co-workers who earn more than she does are proper comparators because their job functions are similar to hers.

Plaintiff's position, Education Advisor, is included in the "ADO Advisor" category within Defendants' employment database. Plaintiff argues that she is similarly situated to eight other employees whose positions fall within the ADO Advisor category. While these employees fall within the ADO Advisor category, their functional job titles are either Community Advisor or Urban Affairs Advisor.[8] Defendants argue that the Community and Urban Advisors are not proper comparators because they do not perform similar duties to Plaintiff.

Plaintiff testified that she is the primary GPC contact for the Georgia School Board Association, the Georgia School Superintendent Association, the Department of Education, the Georgia Association of Educational Leaders, and the Professional Association of Georgia Educators.

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[8] Plaintiff contends that she is similarly situated to Community Advisors James Lovett, John Perryman, Clinton Taylor, Stewart Rodeheaver, and John Thrasher and Urban Advisors Myles Smith, James vaseff, and Steve Foster.

According to Plaintiff, her duties include working with local communities to discuss issues relating to education, education reform, and economics; facilitating relationships with state and local leaders; strategic planning; leadership training; public policy development; traveling statewide to influence education reform; interacting with local governments and agencies; working with Chambers of Commerce on economic issues; and helping communities devise means to raise revenue for projects. Plaintiff Aff. PP 16-27.

According to Defendants, the Community Advisors are responsible for working with local communities to help them prepare for future economic growth, understand their role in the community, and assess their community infrastructures; meeting with community leaders to discuss the economic development process and identifying funding resources; facilitating relationships between local leaders and other members of the community; strategic planning; leadership training; public policy development; providing specialized training to elected officials and community leaders in systems thinking, board governance, behavior styles, tax digesting, consensus building, and strategic leadership; and traveling statewide to assist business customers and, industry organizations with strategic planning and energy-related needs.

The Urban Advisors are responsible for strategic planning, urban redevelopment, and smart growth planning, primarily for the Atlanta metropolitan area; interacting with local governments and regional agencies; developing regional policies and facilitating meetings between different organizations, communities, and agencies; and strategic planning for rezoning projects, urban revitalization, and design issues.

To show that she performed a similar job as her white co-workers, Plaintiff must show only that "she shared the same type of tasks" as her alleged comparators. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992) (finding plaintiff established proper comparator where evidence, including description of the type of duties she performed and testimony from defendant's witnesses, established that she shared the same type of tasks as the other buyers). Plaintiff has met this burden. While the testimony of Plaintiff's alleged comparators indicates that their work is primarily focused on different audiences and sometimes requires specialized knowledge, these employees perform the same type of community outreach and planning functions that Plaintiff does. Plaintiff also provided evidence that she and some of her alleged comparators often work together on outreach projects to reach both educational and general community audiences. Plaintiff Aff. PP 20-27. While Defendants offered the testimony of the alleged comparators and their supervisor that Plaintiff does not perform duties similar to theirs, Plaintiff has provided sufficient evidence to support a finding that she and the other ADO Advisors "shared the same type of tasks." *Miranda*, 975 F.2d at 1529 (emphasis added); *see also Moye v. Fleming Co., Inc.*, 924 F. Supp. 1119, 1130 (M.D.Ala. 1996) (holding that plaintiff established proper comparator where the description of plaintiff's tasks and other supervisor's tasks showed that although no other supervisor did exactly the same job as plaintiff, she performed at least some of the same tasks and had a similar degree of responsibility as at least some of alleged comparators).

However, Defendants have provided a legitimate, nondiscriminatory reason for Plaintiff's lower pay. According

to Defendants, Plaintiff is paid less than her comparators because a market survey, conducted by Defendants, indicated that the value of an Education Advisor was less than that of a Community or Urban Affairs Advisor in the applicable region. Specifically, Defendants contend that pay grade ranges for positions at GPC are established by market surveys and studies of similar positions at other companies in the region. Blalock Dep. at 9-10; Norton Dep. at 196. In 1996, GPC conducted a market survey which resulted in coding the Education Advisor position as exempt level three to exempt level five pay grade range and coding the Community and Urban Affairs Advisor positions as exempt level five to exempt level seven because the value of these positions was deemed to be higher than the Education Advisor position. Blalock Dep. at 92, 143-44.

Plaintiff attempts to establish pretext by arguing that the market survey is not the real reason for Plaintiff's lower pay. Specifically, Plaintiff argues that Defendants' market survey results do not justify Plaintiff's lower pay because black Community and Urban Affairs Advisors earn less than their white counterparts and because the market survey did not actually determine that the Education Advisor was valued lower than the other ADO Advisor positions. Plaintiff, however, has failed to come forward with sufficient evidence to support her claims.

The proper pretext analysis is whether Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employers proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). To support her claim that the Community

and Urban Affairs Advisor positions are not actually more highly valued than the Education Advisor position, Plaintiff submits the 2000 Performance Pay Plan for Deryl Belser. App, to Pla. Resp. to Def. Mot. S. J., Ex. 26. The document indicates that Belser held the position of ADO Advisor II and received *a* base salary increase in 2000 from $45,544 to $48,290. Although Plaintiff contends in her response that Belser is black and that he is an Urban Affairs Advisor, she has presented no evidence to support these assertions. Plaintiff also contends that Nettie Felder, a black ADO Advisor was paid less than Felder's white co-workers, but Plaintiff fails to point to any evidence that supports this claim. Thus, these claims do not create an issue as to whether Community and Urban Affairs Advisors are actually valued more highly than the Education Advisors.

Plaintiff also argues that the market survey conducted by Defendants in 1996 does not indicate that Education Advisors are less valuable than the other ADO Advisors. To survive summary judgment, Plaintiff must come forward with evidence of specific facts to contradict Defendants' reason. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)). To support her argument with respect to the market survey, Plaintiff contends that Defendants have provided no evidence to support their claim that a market study was performed with respect to the ADO Advisor positions. Plaintiff has provided a copy of a market survey of GPC positions conducted in 1996 which does not appear to include information about the positions at issue. However, as noted above, Defendants did provide testimony that such a market study was conducted and that the results

valued the Community and Urban Affairs Advisor positions more highly. Blalock Dep. at 92, 143-44. That Defendants did not include the ADO Advisor positions in the market survey report is not substantially probative; Plaintiff provides no evidence with respect to whether that survey included all positions within the company or whether formal market surveys were even required. Based on this evidence, the inference that Defendants did not actually survey the market with respect to the ADO Advisor positions is no more likely than the inference that they did conduct such a survey. Thus, Plaintiff has failed to create a genuine issue of fact precluding summary judgment. Cf. *James v. Otis Elevator Co.*, 854 F.2d 429, 432 n.3 (11th Cir. 1989).

However, Plaintiff also argues that she was discriminated against because she received unfairly low merit increases and incentives. Specifically, Plaintiff contends that she unfairly received lower merit increases than John Thrasher received. According to Plaintiff, her lower increases were unfair because although the merit increases are based on an employee's performance, Thrasher, despite receiving poor performance evaluations, received higher increases than Plaintiff. Plaintiff, however, has failed to point to evidence to support her assertion that Thrasher received higher merit increases than she did.

Plaintiff points to Thrasher's performance pay plans for 1999 and 2000 but only refers to her performance pay plans for 1997, 1998 and 2000. Thus, the only evidence to support Plaintiff's claim that Thrasher received higher increases than she did are the 2000 plans, which indicate that Plaintiff received a 2.58% merit increase and 16% incentive award while Thrasher received a 2.26% merit increase and 11.6% incentive award. While Plaintiff

purports to offer evidence that she earned a lower percentage merit increase in 1999 than Thrasher did, the document that she submitted in this respect is inadmissible. That these percentage awards resulted in higher actual awards for Thrasher due to his higher base salary is not evidence of discrimination because Defendants have already offered a non-discriminatory explanation for that difference in compensation. Plaintiff has therefore failed to produce evidence sufficient to support a finding of pretext. Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's compensation claims is GRANTED.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish pretext. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); In re: *Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999) The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; In re: *Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are

not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim and that even if Plaintiff could establish such disparity, she has failed to show a causal link to a neutral employment practice.

As evidence of a facially neutral policy, Plaintiff points to Defendants' promotion and compensation policies, which Plaintiff contends permits subjective, discretionary, and unmonitored decisions. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in her motion for class certification to support her claim that Defendants allowed the use of subjective criteria by decisionmakers in each of their subsidiaries.

However, simply showing that Plaintiff was subject to subjective policies does not establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that manager discretion in compensation and promotion decisions caused a statistically significant disparity.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the compensation of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); In re: *Alabama*, 198 F.3d at 1312. While plaintiff's expert reports an over-all statistical disparity between black and white employees in compensation, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation.

Even if these statistics were sufficient to establish a statistically significant disparity, Plaintiff cannot establish the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. As noted above, Plaintiff has failed to indicate a specific facially neutral practice other than the use of manager discretion in compensation decisions. Further, Plaintiff has presented only company-wide statistics and does not tailor the data to control for factors such as skill level and experience. For Plaintiff to establish that the use of a practice as broad and amorphous as manager discretion causes a statistically significant disparity would require Plaintiff to eliminate the effect of variation in these factors, which she has failed to do in the statistics currently before the Court. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate

impact claim is GRANTED. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31st day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC. Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1278; 2003 U.S. Dist. LEXIS 5766

March 31, 2003, Filed

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Sarah Jean Harris. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless noted otherwise. Plaintiff began working at Georgia Power Company ["GPC"] in 1979 as a General Clerk.[1] By 1989,

[1] Defendants The Southern Company ["TSC"], Southern Company Energy Solutions, Inc. ["SCES"], and Southern Company Services

(Continued on following page)

she had progressed to Operating Assistant. In 1994, plaintiff was reassigned to the Duluth office as a Secretary. Plaintiff's job title was changed to Region Support Representative in 1997.

["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC, SCES, or SCS. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned his claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern RY. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits. Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[ ] who receives compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services. Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to Plaintiff's claims. Plaintiff has failed to provide evidence that any SCS employees were involved in any allegedly discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and SCS.

Performance Evaluations

Hugh Walters, Power Delivery Manager for the GPC's Gwinnett Region, evaluated Plaintiff's job performance for 1997 and noted that she needed "to improve in the following areas: teamwork, cooperation, personal use of telephones, and getting to work on time." Walters Dec. P 5. Furthermore, Plaintiff did not "show adequate objectivity or openness to the views of others" and made "minimal" contributions to building team spirit. *Id.* Plaintiff sometimes "exhibited a lack of tact or consideration for others and she would be easier to work with if she projected a more positive outlook and pleasant manner." *Id.*

In his evaluation of her job performance for 1998, Thomas B. Davis, Plaintiff's supervisor, noted that she continued to make excessive use of the telephone for personal calls and was habitually tardy and remained unwilling or unable to cooperate with her co-workers. Davis Dec. P 9. In April, May and June of 1999, Davis and Walters coached Plaintiff regarding her unsatisfactory performance. In her mid-year 1999 evaluation, Plaintiff was rated either "Unsatisfactory" or "Needs Improvement" in every performance category listed on the evaluation sheet. Davis Dec. P 6. Among other things, the evaluation noted that Plaintiff worked overtime to complete tasks that should have been completed in half a day, made mistakes matching service orders with wiring approvals, remained unsuccessful working in group situations, remained unable to return from lunch on time, and continued to spend too much time on personal telephone calls.

Shortly after her 1999 mid-year review, Walters placed Plaintiff on GPC's Positive Discipline program. The Positive Discipline Program is used when an employee

does not respond to informal mechanisms to correct poor work performance. In level one, the Oral Reminder, the employee's immediate supervisor reminds the employee of the supervisor's performance expectations and describes how the employee is not meeting those expectations. If the Oral Reminder does not correct the problem, a Written Reminder is administered. The Written Reminder is the second level of Positive Discipline and documents a discussion about unacceptable behavior or performance, the supervisor's expectations, and what the employee intends to do to correct the problem. If, within twelve months from the date of the Written Reminder, the employee does not correct the problems, the final level of Positive Discipline, Decision-Making Leave ["DML"], is triggered. The DML includes a discussion during which the extreme seriousness of the employee's problem is made clear, and the requirement for a total performance commitment is communicated. The employee is given a workday off with pay to decide either to resolve the problem or resign from GPC. If the employee elects the former option, specific notice is given that if any performance problem that requires disciplinary action occurs in the eighteen months following the DML, the employee is likely to be terminated. An employee who fails to make adequate improvement while on DHL, or who commits another work infraction which might otherwise call for discipline during the eighteen months while a DML is active, is discharged.

On October 7, 1999, Plaintiff was placed on DML status and she was given a day off to consider whether she wanted to remain employed by GPC. Upon return from DML, Plaintiff made a total performance commitment to her assigned duties and agreed to work toward solving her work performance and conduct problems. Plaintiff was the

only Customer Service Employee in the entire Gwinnett Region who was on DML status.

Defendants allege that although Plaintiff showed some improvement in her February 2000 evaluation, which covered her performance in the second half of 1999, "the problems still existed that were documented and talked about in the reviews." Davis Dec. P 8; Davis Dep. at 57. Defendants also contend that Plaintiff's performance remained below that of other employees in her department. Davis Dec. P 8. Plaintiff challenges this description of her performance, pointing to Davis's testimony that he did not have any problems with Plaintiff's performance beginning one month after she was placed on DML status. Davis Dep. 52-53. Plaintiff also challenges Defendants' assertion that her performance remained below that of other employees, pointing to evidence that a white employee performing the same or similar tasks was rated at the same level as Plaintiff. Plaintiff Aff., Ex. J.

Defendants also contend that Plaintiff's evaluations from January 1998 through July of 2000 were not as good as those of Plaintiff's white co-workers. Plaintiff challenges this assertion, arguing that the scores in her mid-year 2000 evaluation were equal to those of her white co-workers, and that her evaluation score for 1999 was the same as one of her white co-workers. Plaintiff Aff., Ex. J.

Promotions

In 1999, Plaintiff approached Charles Mitchell about filling an open Region Support Representative position. According to Plaintiff, Mitchell told her that the position was being held for Denise Hewes, a white employee. Plaintiff alleges that she then told Mitchell that she

"wouldn't interview for it." Plaintiff Dep. 126. Defendants contend that Mitchell informed Plaintiff that the opening was for an entry-level position which would have been a demotion for Plaintiff. Mitchell Dec. P 3. Neither Plaintiff nor Hewes applied for the position, which was awarded to a third person. *Id.*

In January of 1999, Kay Barron was awarded a Drafter's position as a result of a developmental move. Developmental moves are, in accordance with GPC policy, exempted from the Company's standard posting process. According to Defendants, Hugh Walters, Alan Golden, and Charles Mitchell identified Barron for a developmental move into this position because of her excellent performance the preceding three years as a Region Support Representative. Barron had Previously expressed interest in becoming a Drafter and had in fact passed the drafting exam on April 28, 1998. Plaintiff had never expressed any interest in becoming a Drafter and never attempted the drafting exam.

On June 23, 1999, a second Drafter position was posted in the Duluth Operating Center. The position would require the successful candidate to provide scaled and detailed engineering related drawings to support company construction, maintenance and operations activities, and to provide plans and sketches, resolve design problems, prepare estimates, and make scale calculations. Plaintiff did not apply for the position. The position was awarded to John Tillman, an employee who was already a Drafter A with six years' experience in the engineering department. Plaintiff had no engineering experience, had not taken the required Technical Occupations Draft test, and therefore, lacked essential experience required for the position.

Compensation

According to Defendants, GPC's annual merit pay increases and bonuses are performance-based. In 1998 and 1999, David Seago made the final decisions on what performance-based compensation increases would be given to Plaintiff and her white co-workers Diane Wylie and Lynn Collett. Defendants assert that the race of each woman played no role whatsoever in any decision he made regarding performance-based compensation increases. According to Defendants, Seago made these decisions based on each woman's job performance, as memorialized in the performance evaluations prepared by Thomas B. Davis, their direct supervisor. Defendants contend that throughout 1998, 1999 and 2000, neither Wylie nor Collett was on any form of corrective discipline. Plaintiff argues that Wylie and Collett's evaluations state that they took long lunches, were late to work, and made personal phone calls. Harris Aff., Ex. L.

Due to a company reorganization in the Fall of 2000, the Distribution Employees – Plaintiff, Collett, and Wylie – began reporting to Jim Sykes. Thus, Jim Sykes and David Seago jointly made the final decisions on what performance-based compensation increases would be given Diane Wylie and Lynn Collett in 2000. Plaintiff did not receive a performance-based increase in 2000 because she was terminated prior to her year-end review.

Retaliation

On July 27, 2000, Plaintiff and her co-plaintiffs filed the instant lawsuit. Plaintiff alleged that she "received lower performance evaluation scores than her Caucasian counterparts who perform in an equal or less proficient

manner." Third Amended Complaint at 35. Plaintiff also alleged that she was "denied job opportunities on the basis of her race." *Id.* at 36.

Shortly after filing her lawsuit, Plaintiff requested a mid-year performance evaluation. Defendants provided Plaintiff with an evaluation expressing general satisfaction with Plaintiff's performance. Defendants contend that shortly after completing this evaluation, they began receiving complaints about Plaintiff's job performance, including customer complaints about delays in service connections, co-worker complaints that service orders prepared by Plaintiff for engineers were filled with mistakes, and complaints that Plaintiff's personal telephone usage had dramatically increased and was preventing her from completing her work. Defendants further claim that the work Plaintiff did complete was riddled with significant errors, leading to numerous customer complaints.

Defendants further claim that around August 22, 2000, Walters was informed that Plaintiff had falsified a document to make it appear that on August 16, 2000, she had given a GPC engineer information about an address that needed to be visited to determine what service was necessary. Walters Dep. 58-60. Specifically, Defendants contend that an engineer, Keith Thomas, went to his supervisor, Steve Lewis, and reported that he had received a work order on August 22, 2000, which Thomas believed had originally been received by Plaintiff on August 16, 2000. *Id.* at 87, 90-91. Walters concluded that Plaintiff in fact gave the engineer the document on August 22, 2000, and falsified company records to make it appear that the engineer had failed to visit the address in a timely manner. *Id.* at 91.

According to Defendants, on August 24, 2000, Walters and Davis met with Seago to discuss the drastic decline in Plaintiff's performance. Defendants contend that after considering her DML status, her falsification of records, and the dramatic decline in her performance since her mid-year review, Seago and Walters decided to terminate Plaintiff.

Plaintiff's Claims

In Plaintiff's Amended Responses to GPC's First Interrogatories, she identified twenty-nine individuals who she contends received higher compensation for work that is the same or similar to work she performed.[2] In 1998, 1999, and 2000, David Seago did not make the final decisions on what performance-based compensation increases would be given to any of these employees except for Sheila Green. During this time period, none of these employees worked in the Gwinnett Region under his supervision or under the supervision of either Hugh Walters or Britt Davis. In 1998, 1999, and 2000, all of these employees except for Sheila Green worked in different regions and under different supervisors than Plaintiff. Defendants allege that some of these employees had different job titles and vastly different job duties from Plaintiff. None had ever been placed on DML status. In

[2] They are Priscilla Johnson, Teresa Thompson, Bantes Hodges, Diane Seagraves, Rebecca Sellers, Belinda Seamen, Carolyn Helms, Patricia Ann Reuter, Christine Morris, Regina Sinclar, Ann Rogers, Diane Cooper, Deborah Lee, Phyllis Austin, Rebeca Stevens, Tara Prince, Carolyn Simmons, Cathy McDaniel, Sallyann Mount, Jewel Lewis, Shirley Stefanini, Susan Hinnant, Barbara Mansell, Neita Cox, Suzanne Corley, Sabra Zautke, Nancy Crisp, Carlita Stewart, and Sheila Green.

September of 2000, Plaintiff amended her complaint to allege that she was terminated in retaliation for filing the instant suit and because of her race.

II. Defendants' Summary Judgment Motion

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found Liable for unlawful discrimination under any one of three discrete theories: disparate treatment, pattern and practice, or disparate impact. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[3] The first two theories require

[3] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48

(Continued on following page)

proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on Plaintiff, the Court will address them separately.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a prima facie case using circumstantial evidence, a plaintiff may use the test recognized in McDonnell Douglas.[4] Under this test, a plaintiff may establish a prima facie case by demonstrating 1) that he

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L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group. Inc.*, 168 F.3d 468, 472 (11th Cir. 1999)

[4] The McDonnell Douglas standard for a prima facie case is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

belongs to a protected class under Title VII; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's other circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an

inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (*citing Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

In their motion, Defendants assert that Plaintiff has failed to establish a discrimination claim under any of the available theories. In response, Plaintiff points to facts in the record which she contends raise genuine issues of material fact precluding summary judgment as to her claims of retaliation, compensation discrimination, pattern and practice discrimination, and disparate impact. It is therefore necessary to determine whether Plaintiff has provided sufficient evidence to raise a genuine issue of material fact to preclude summary judgment as to these claims.

Failure to Promote

Plaintiff alleges in the complaint that Defendants improperly denied her promotions based on her race. complaint P 99. Specifically, Plaintiff claims that Defendants discriminated against her when they did not hire her to fill the Senior Region Support Representative position in October of 1999. Defendants argue that summary judgment is appropriate because Plaintiff never

applied for this position or for any other position during her employment by Defendants.

Generally, a plaintiff's failure to apply for the position in question precludes a claim of discrimination in promotion. *Evans v. McClain of Georaia. Inc.*, 131 F.3d 957, 963 (11th Cir. 1997); *Harris v. Warehouse Services. Inc.*, 77 F. Supp. 2d 1240, 1246 (M.D.Ala. 1999). However, a plaintiff is not required to show that she applied for a position if she shows that the employer maintained an informal promotion process under which job opportunities were not regularly posted. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984); *Harris v. Birmingham Board of Education*, 712 F.2d 1377 (11th Cir. 1983). Plaintiff does not dispute that she did not apply for this or any other position during her employment and has not pointed to any evidence that Defendants maintained an informal promotion process under which job opportunities were not regularly posted. Because Plaintiff has failed to establish a prima facie case, her claim for promotion discrimination must fail. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000). Accordingly, Defendants motion for summary judgment on Plaintiff's failure to promote claim is GRANTED.

Compensation Discrimination

To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774

(11th Cir. 1991) (applying the test in an age discrimination case). Defendants argue that summary judgment is appropriate because Plaintiff cannot establish that similarly situated persons outside the protected class were paid more than she was or that she was qualified to receive the higher wages.

Defendants first contend that summary judgment is appropriate because Plaintiff has failed to produce evidence of a proper comparator and thus cannot establish that similarly situated persons outside the protected class received higher wages. "In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Plaintiff claims that co-workers Wylie, Collett, and Barron were similarly situated white employees who were paid more than she was.

Plaintiff has failed to point to any evidence to support her claim that Kay Barron is a proper comparator.[5] Plaintiff cites to the deposition testimony of her former supervisor, Britt Davis, to support her argument that she, Collett, and Wylie performed the same or similar functions. According to Davis's testimony, Plaintiff, Collett, and Wylie carried out administrative tasks for the cable locator team under Davis's supervision. Davis indicated that Collett was responsible for recording data with respect to the

[5] Plaintiff cites to the performance evaluations for herself and Barron as evidence that they performed similar tasks. Although these reports indicate that Plaintiff and Barron held similar job titles, they contain no information as to what their respective specific job functions were.

team's completed work orders and for resolving problems with respect to service delivery and that she also served as a back-up for recording the crew's work time. Davis Dep. 25-26. Wylie's main function was to enter crew time and invoice data and to complete several other minor administrative duties. Plaintiff's responsibility was to process service requests from new customers. There is some evidence that Plaintiff, Wylie, and Collett were capable of performing each other's job functions to some degree but did not do so on a regular basis.

Defendants argue that Plaintiff has no proper comparator pointing out that none of the alleged comparators had the same discipline problems as Plaintiff. Specifically, Defendants argue that Plaintiff's performance problems prevented her from receiving better evaluations and the higher performance-based compensation received by her co-workers. Plaintiff was the only Customer Service Employee in the entire Gwinnett Region who was on DHL status. According to Defendants, throughout 1998, 1999, and 2000, neither Wylie nor Collett was on any form of corrective discipline.

Plaintiff argues that her performance deficiencies cannot justify her lower compensation for two reasons. First, Plaintiff asserts that merit increases and annual incentives were the only aspects of compensation affected by employee performance. Plaintiff contends that her co-workers' merit increases were at most only two percent more than Plaintiff's merit increases and that therefore performance deficiencies do not explain why Wylie earned fourteen percent and Collett nineteen percent more than Plaintiff. Plaintiff cites to supervisor Seago's testimony that merit increases and annual incentives were based on employee performance; however, Seago did not address

whether employee performance affected other aspects of compensation. Plaintiff has not pointed to any other evidence to support her claim that only merit increases and annual incentives were performance-based. Thus, Plaintiff has failed to establish that these merit increases were the only aspect of compensation affected by employee performance.

Plaintiff also contends that her poor performance does not justify the compensation disparity because her co-workers were also counseled about performance deficiencies. Specifically, Plaintiff relies on her co-workers' performance evaluations indicating that her co-workers were advised to "keep personal phone calls to a minimum and limit lunch breaks to 60 minutes." Plaintiff Aff., Ex. L. However, as Defendants note, these evaluations were completed in 1998, and there is no evidence that either Wylie or Collett failed to correct these issues after being counseled about them. Plaintiff also contends that she did not commit "significantly" more errors than white employees performing the same or similar jobs and challenges Defendants' contention that Plaintiff's evaluations from January 1998 through July of 2000 were not as good as those of Plaintiff's white co-workers. To support these claims, Plaintiff notes that the scores in her mid-year 2000 evaluation were equal to those of her white coworkers, and that her evaluation score for 1999 was the same as one of her white co-workers. Plaintiff Aff., Ex. J. That Plaintiff twice received evaluation scores equal to her white co-workers after being counseled about her performance deficiencies and placed on DML status is insufficient to overcome Defendants' evidence that Plaintiff's overall performance during the period in question was not as good as that of her white co-workers. Plaintiff's belief that her

performance was equal to that of her co-workers does not support a finding that Plaintiff was actually qualified for the higher pay. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997).

Such disparity in disciplinary status precludes the use of Collett and Wylie as proper comparators. *See MacPherson*, 922 F.2d at 774-75 (comparing performance evaluation scores to determine whether co-workers are in "similar situation" and thus proper comparators). Plaintiff's inability to controvert Defendants' evidence with respect to her poor performance also weakens her argument that she was qualified for the higher wage. In any event, even if Plaintiff was able to establish a prima facie case, Plaintiff's poor performance also constitutes Defendants' nondiscriminatory reason for her lower compensation. As discussed above, Plaintiff has failed to provide sufficient evidence to rebut Defendants' evidence with respect to Plaintiff's poor performance nor has Plaintiff provided evidence to establish that Plaintiff's poor performance was not the real reason for her compensation rate.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' compensation practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the compensation of black employees relative to white employees, are evidence from which a reasonable fact-finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently specific to support her individual claims.

Plaintiff's statistics compare the compensation rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations or specific position in which she worked. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment, *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[6] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).

Because Plaintiff has failed to provide any evidence of pretext, Defendants are entitled to summary judgment on Plaintiff's compensation claim. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's compensation claim.

Retaliation

Plaintiff also contends that her termination in August 2000 following the filing of this lawsuit constituted retaliation prohibited under Title VII. To prevail on her retaliation

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[6] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

claim, Plaintiff must show (1) statutorily protected expression, (2) adverse employment action, and (3) a causal link between the protected expression and the adverse action. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). Defendants contend that summary judgment is appropriate because Plaintiff has failed to establish a causal link between the lawsuit and her termination.

The causal link requirement is interpreted broadly: "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Meeks v. Computer Associates Intern.*, 15 F.3d 1013, 1021 (11th Cir. 1994) (internal quotation marks and citation omitted). To establish a causal link, Plaintiff relies on the short time between the filing of the lawsuit on July 27, 2000, and her termination on September 1, 2000. Such temporal proximity is sufficient to establish a prima facie case. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999) (holding that plaintiff established prima facie case of retaliation where evidence indicated that plaintiff was terminated seven weeks after supervisors became aware that plaintiff filed EEOC charge).

Once Plaintiff has established prima facie case, Defendants may rebut a presumption of discrimination by offering a nondiscriminatory reason for Plaintiff's termination. *Goldsmith*, 996 F.2d at 1163. In this case, Defendants contend that Plaintiff was terminated in August 2000 due to a rapid and severe deterioration in her performance in July and August of that year and to Plaintiff's alleged falsification of company documents. Plaintiff argues that the allegations of a decline in performance are contradicted by statements contained in the positive evaluation she received just one week before Defendants

made the decision to terminate her employment. Plaintiff also offers evidence to contradict Defendants' allegations that she falsified documents. Plaintiff argues that this evidence creates genuine issues of fact with respect to the cause of her termination precluding summary judgment.

Defendants contend that the evaluation at issue covered only Plaintiff's performance from January 2000 through June 2000 and thus does not rebut the evidence that Plaintiff's performance declined beginning in July 2000. However, Plaintiff provides evidence that the evaluation applied to Plaintiff's post-June performance as well. The evaluation does refer to events in July. However, this "event" was the publication of a company newsletter noting that Defendants had received a customer letter thanking Plaintiff and others for their service and there is no evidence with respect to when the letter was written.[7] Plaintiff also offers the testimony of Seago and Davis that supervisors may discuss performance issues with employees outside the context of a formal evaluation. This evidence is insufficient to create an issue of fact as to whether the evaluation covered Plaintiff's performance after June 2000.

Plaintiff's evidence with respect to whether she falsified a document is only relevant to the extent that it proves Defendants did not reasonably believe that Plaintiff falsified the document. *See E.E.O.C. v. Total System Services. Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000) (citing *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (noting that inquiry is not whether employee

[7] Defendants contend that the letter was written in May 2000 but offer to evidence to support this assertion.

was guilty of misconduct but whether employer in good faith believed employee had done wrong and whether this belief was the reason for the termination)). Defendants contend that Plaintiff's supervisor, Hugh Walters, had information which led him to conclude that on August 22, 2000, Plaintiff gave a service order to Keith Thomas, an engineer, but then made an entry into the computer system indicating that she had given it to him on August 16, 2000. According to Defendants, on August 22, 2000, Thomas reported to his supervisor, Steve Lewis, that Plaintiff had given him a work order, printed from the software program which organizes service requests, that day. Walters Dep. 91. Lewis then "went out in the field" to determine what type of service was required. *Id.* After returning to the office that day, Lewis checked the order within the software program and noted that it appeared to have been amended to indicate that the work order had been given to Thomas on August 16, 2000. *Id.* Upon receiving this information, Walters discussed the matter with Lewis before determining that Plaintiff had falsified the document. *Id.* at 90. Walters did not confront Plaintiff with this evidence. *Id.* at 88. However, Defendants contend that Walters was not required to question Plaintiff about the document. Seago Dep. 39-40. While Plaintiff has provided evidence to contradict Defendants' description with respect to whether Davis, Plaintiff's immediate supervisor, participated in the termination decision, there is no evidence to support a finding that Walters did not maintain a good faith belief that Plaintiff falsified the document. Given Plaintiff's disciplinary status at the time, this evidence is insufficient to create a genuine issue of material fact as to pretext. Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's retaliation claim is GRANTED.

Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support his argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come

forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern or practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k), *Joe's Stone Crab*, 220 F.3d at 1274; *In re: Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim and that even if Plaintiff could establish such disparity, she has failed to show a causal link to a neutral employment practice.

As evidence of a facially neutral policy, Plaintiff points to Defendants' compensation policies, especially Defendants' base salary policy, which Plaintiff contends permits subjective, discretionary and unmonitored decisions. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy

which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in her motion for class certification to support her claim that Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, simply showing that Plaintiff was subject to subjective policies does not establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that manager discretion in compensation decisions caused a statistically disparity within the promotions for which she applied.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the compensation of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Alabama*, 198 F.3d at 1312. While Plaintiff's expert reports an over-all statistical disparity between black and white employees in compensation, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly

diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation.

Even if these statistics were sufficient to establish a statistically significant disparity, Plaintiff cannot establish the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. As noted above, Plaintiff has failed to indicate a specific facially neutral practice other than the use of manager discretion in compensation decisions. Further, Plaintiff has presented only company-wide statistics and does not tailor the data to control for factors such as skill level and experience. For Plaintiff to establish that the use of a practice as broad and amorphous as manager discretion causes a statistically significant disparity would require Plaintiff to eliminate the effect of variation in these factors, which she has failed to do in the statistics currently before the Court. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is GRANTED. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31st day of March, 2003.

/s/ ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1305; 2003 U.S. Dist. LEXIS 5725

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Irene McCullers. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless indicated otherwise. Defendant Georgia Power Company ["GPC"] hired Plaintiff Irene McCullers ["Plaintiff"] in 1978 as a file clerk. Plaintiff is an African-American woman. The

last position Plaintiff held while employed by GPC was Document Processing Operator Senior. This position was one pay grade lower than Chief Document Processing Operator. At GPC, Gail Ward ("Ward"], who worked in the same department as Plaintiff, held the position of Chief Document Processing Operator. Ward is a white female.

In January of 1997, Plaintiff and some of her GPC co-workers, including Ward, transferred from employment with GPC to Southern Company *Services,* Inc. ["SCS").

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[1] Defendants The Southern Company ("TSC") and Southern Company Energy Solutions, Inc. ["SCES"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCES. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned her claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk & Southern Ry.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[ ] who receive[s] compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial

(Continued on following page)

When Plaintiff moved from GPC to employment with SCS, she was given the job title of Computer Operator I. This change in Plaintiff's job title did not entail any change in Plaintiff's compensation level or seniority in comparison to her peers. Upon moving from GPC to SCS, Ward was given the title of Computer Operator Senior. Computer Operator Senior was one pay grade level higher than Computer Operator I. When Plaintiff moved from GPC to SCS, she was assigned to the Imaging and Micrographic group ["IMS"), which is a part of SCS's Production Systems Department. The Production Systems Department is part of SCS's Infrastructure Organization, which is part of SCS's larger Information Resources Department.

In 1997 when Plaintiff moved to SCS, white employees Mildred Brune ["Brune"], Shirley Keen ("Keen"], and Faye Starbird ("Starbird") were already employed by SCS in the IMS, and they had job titles within the Accounting Clerk job family. Keen, Starbird, and Brune were hired by SCS more than six years before GPC hired Plaintiff. In early 1999, SCS decided to reduce and consolidate the number of job titles and job families in the Information Resources Department. As part of the consolidation effort, SCS merged the Computer Operator and the Accounting Clerk job families into one new job family titled Processing Operator. Plaintiff's job title was changed from Computer

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involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to McCullers' claims.

Plaintiff has failed to point to facts sufficient to support her argument that TSC is liable for any discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC and SCES.

Operator I to Processing Operator I. This change in Plaintiff's job title did not entail any change in Plaintiff's compensation level, seniority, or job responsibilities.

Brune and Keen, who held SCS Accounting Clerk Coordinator titles, assumed Processing Operator I titles. Starbird's position, SCS Accounting Clerk Senior, was renamed Processing Operator II. In May 1999, SCS promoted Starbird to Processing Operator I. On March 4, 2000, SCS promoted Brune to Processing Operator Senior. According to Defendants, SCS promoted Brune to Processing Operator Senior because she performed her duties at a level that SCS viewed as consistently meeting and exceeding expectations. Defendants contend that SCS did not promote Plaintiff from Processing Operator I to Processing Operator Senior because, unlike Brune, plaintiff's performance was not viewed as consistently meeting and exceeding job expectations, and because Plaintiff had ongoing deficiencies in work attendance and tardiness.

Plaintiff filed this suit on July 27, 2000, claiming that Defendants discriminated against her by denying her a progressive promotion to Processing Operator Senior and by paying her less than similarly situated white co-workers.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in its motion for summary judgment, Defendants must show that the evidence

is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[2] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on the parties, the Court will address them separately.

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[2] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp, v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a prima facie case using circumstantial evidence, a plaintiff may use the test established in *McDonnell Douglas*.[3] A plaintiff may establish a prima facie case by demonstrating 1) that he belongs to a protected class under Title VII; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment

[3] The *McDonnell Douglas* standard for a prima facie case is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *McDonnell Douglas*, 411 U.S. at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 P.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown v. American Honda Motor Co.*, 939 F.2d 946,

952 (11th Cir. 1991) (*citing Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Disparate Treatment

Promotion Discrimination

Defendants first argue that they are entitled to summary judgment on Plaintiff's promotion claim because Plaintiff has failed to establish a prima facie case of promotion discrimination. To establish a prima facie case for alleged failure to receive a promotion, Plaintiff must demonstrate that 1) she was a member of a protected class; 2) she applied and was generally qualified for the up-grade; 3) she did not receive the promotion; and 4) a similarly situated white employee received promotion over Plaintiff. *See. e.g., Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Harris v. Sec'y, U.S. Dep't of the Army*, 119 F.3d 1313, 1321 (8th Cir. 1997) (applying test in context of non-competitive promotion). In the complaint, Plaintiff alleges that she was discriminated against when co-worker Brune became a Processing Operator Senior while Plaintiff remained a Processing Operator One. This was a "progressive promotion" for Brune based on job performance.[4]

Defendants are entitled to summary judgment on this claim because Plaintiff has failed to establish a prima facie

[4] Plaintiff also contends in the complaint that she was discriminated against when, at the time of her transfer from GPC to SCS, co-worker Ward was promoted to Processing Operator Senior but Plaintiff was not. Because Ward's promotion occurred in 1997, any claim based on the transfer is barred by the applicable statutes of limitations for Title VII and Section 1981 claims.

case of promotion discrimination. Defendants state and Plaintiff does not contend that progressive promotions are not awarded to one employee to the detriment of another. Gantt Dec. P 5. Therefore, Plaintiff cannot show that a similarly situated white employee received a promotion over her because she and Brune were not competing for the same position. Nor can Plaintiff establish that she was qualified for a promotion. To qualify for progressive promotion from Processing Operator I to Processing Operator Senior, SCS requires only that the employee perform at an overall level that "consistently meets and exceeds expectations." *Id.* According to Defendants, Plaintiff was not a consistently strong performer – she did not consistently perform at a level that met and exceeded the expectations of her job. Gantt Dec. PP 6-8; Patten Dec. PP 6, 18. Plaintiff argues that she was in fact qualified for a promotion because she received better evaluations than her alleged comparators and because her alleged performance deficiencies were not actually considered serious performance problems by Defendants. According to Plaintiff, she had the requisite experience and knowledge for the job and was rated in meets and exceeds expectations range, just as Brune was. Patten Dec. P 6; Gantt Dec. P 7. Plaintiff also argues that her alleged tardiness and absenteeism could not have been considered a serious problem because she was rated at the consistently meets and frequently exceeds level and her 1999 and 2000 evaluations do not specifically mention any such problems. However, Plaintiff has produced no evidence to support her contention that she was rated at the consistently meets and frequently exceeds level. Further, a supervisor's testimony that he would note areas of weakness in an employee's performance in the employee's formal evaluation does not establish that Defendants did not consider Plaintiff's tardiness and

absenteeism in making promotion decisions. Gantt Dep. 25.

Plaintiff also points to evidence that she received higher percentage merit increases in 1998 and 1999 than Brune did. Patten Dec. PP 14, 20. However, Plaintiff provides no evidence with respect to how the exact percentage of increase is determined. Further, as Defendants note, Brune received a higher percentage merit increase that Plaintiff in 2000, the year in which Brune was promoted. Thus Plaintiff's evidence with respect to the percentage of merit increases is insufficient to create an issue of fact as to whether Plaintiff was qualified for a promotion.

Because Plaintiff has failed to state a prima facie case of promotion discrimination and cannot otherwise establish that intentional discrimination occurred, Plaintiff's promotion claim must fail. Accordingly, Defendants' motion for summary judgement is GRANTED with respect to Plaintiff's promotion claims.

Compensation Discrimination

Plaintiff contends that Defendants discriminated against her by paying her less than similarly situated white co-workers. To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case. Defendants do not

dispute that Plaintiff is a member of a protected class or that she received low wages but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay.

"In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Plaintiff claims that co-workers Ward, Brune, Starbird, and Keen are similarly situated white employees who are paid more than she is. Starbird and Keen constitute proper comparators because they hold the same position as Plaintiff and thus perform the same functions as Plaintiff. Brune is also a proper comparator to the extent that she held the same title as Plaintiff during the period in question.

Defendants however contend that Plaintiff received lower compensation than Brune, Starbird, and Keen because these coworkers have been employed by Defendants for at least six years more than Plaintiff. Seniority constitutes a legitimate nondiscriminatory explanation for a difference in pay. *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 599 (11th Cir. 1994). Plaintiff attempts to establish pretext by arguing that seniority cannot explain the pay differential because Plaintiff received a higher percentage merit increase than Brune and Keen in 1998 and 1999. Plaintiff also argues that seniority does not explain why Starbird earns a higher salary than Plaintiff because Starbird earned less than Plaintiff in 1999. However, that Brune and Keen received a lower percentage increase does not contradict Defendants' evidence that Brune and Keen

received a higher base salary because they had worked for Defendants longer than Plaintiff had. That Starbird earned less than Plaintiff in 1999 but now earns more than Plaintiff is attributable to Starbird's seniority to Plaintiff and promotion in 1999 to the same position as Plaintiff. Plaintiff also argues that Defendants did not specifically refer in their discovery responses to seniority as a reason for the pay disparity and do not rely on seniority to explain pay disparities with respect to another Plaintiff is evidence of pretext. However, these minor variances are insufficient to support a finding of pretext.

Nor has Plaintiff provided sufficient evidence to establish that Ward was improperly paid more than she was. Plaintiff has arguably made out a prima facie case by showing that she and Gail Ward, a white employee, perform the same or similar work and Ward is more highly compensated.

> Q Is it fair to say that Ms. Ward's position is the same as or similar to Ms. McCullers'?
>
> A Yes.

Gantt Dep. at 70-71. There is also evidence that there was little variation in the daily responsibilities between the two jobs. *Id.* at 16-17.

In response, Defendants point out that Plaintiff has never held the same title as Ward. At all relevant times Ward, a Processing Operator Senior, has been classified as one notch above Plaintiff, a Processing Operator I. And while Plaintiff's supervisor did state that he considered her position "the same or similar to" Ward's position, he also testified that in her higher position, Ward faced higher expectations than Plaintiff. *Id.* at 16-17. Defendants point

out that Plaintiff has never met Defendants' job assessment criterion, of "meets and exceeds expectations" although she has always been found to "meet expectations". Under Defendants policy, this is not enough for a progressive promotion. Also, Defendant states that Plaintiff has had problems with tardiness and absenteeism. *See* Gantt Dep. 42-43, 45-47, 54; Gantt Decl. P 6, 18. Plaintiff does not deny this. Plaintiff Dep. 76-77, 179-80, 263-67.

In response to Defendants' statement of its reasons for not having paid Plaintiff at the Processing Operator Senior level (Ward's classification), Plaintiff basically argues that Defendants' assessment of her performance level is incorrect. This is not enough to establish pretext.

However, Plaintiff provided statistical evidence of racial imbalances in Defendants' hiring and compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' hiring and compensation practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the hiring and compensation of black employees relative to white employees, are evidence from which a reasonable fact-finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized

hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support her individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to promotion and compensation decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which she worked or the positions which she challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education, and specific promotion processes. *Cooper v. Southern Company* 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to

show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[5] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria). Accordingly, Defendants' motion for summary judgment on Plaintiff's claim of compensation discrimination is GRANTED.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d

[5] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the

existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; *In re: Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim and that even if Plaintiff could establish such disparity, she has failed to show a causal link to a neutral employment practice.

As evidence of a facially neutral policy, Plaintiff points to Defendants' promotion and compensation policies, which Plaintiff contends permits subjective, discretionary, and unmonitored decisions. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in her motion for class certification to support her claim that Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, simply showing that Plaintiff was subject to subjective policies does not establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case,

Plaintiff has failed to establish that manager discretion in compensation and promotion decisions caused a statistically significant disparity.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the compensation of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Alabama*, 198 F.3d at 1312. While Plaintiff's expert reports an over-all statistical disparity between black and white employees in compensation, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation.

Even if these statistics were sufficient to establish a statistically significant disparity, Plaintiff cannot establish the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. As noted above, Plaintiff has failed to indicate a specific facially neutral practice other than the use of manager discretion in compensation decisions. Further, Plaintiff has presented only company-wide statistics and does not tailor the data to control for factors such as skill level and experience. For Plaintiff to establish that the use of a practice as broad and amorphous as manager discretion causes a statistically significant disparity would require Plaintiff to eliminate the effect of variation in these

factors, which she has failed to do in the statistics currently before the Court. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is GRANTED. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., ND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1258; 2003 U.S. Dist. LEXIS 5724

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Michael Edwards. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed except as indicated otherwise. Plaintiff was hired by Defendant Georgia Power

Company ("GPC") in 1987.[1] Complaint P 86. He held positions in several different organizations within GPC, and was employed as a Lineman in early 1999 when he

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[1] Defendants The Southern Company ["TSC"], Southern Company Energy Solutions, Inc. ["SCES"], and Southern Company Services ["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did he ever apply for positions at TSC, SCES, or SCS. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned his claim against SCES. *Resolution Trust Core. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits. Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[] who receive[s] compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services. Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to Plaintiff's claims. Plaintiff has failed to provide evidence that any SCS employees were involved in any allegedly discriminatory acts. *See Wood v. Southern Bell Telephone and Telegrah Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and SCS.

reported problems with a work-related back injury. Edwards Dep., Vol. III, at 47-51 & Exhibit 4. Effective on or about March 3, 1999, he was placed on permanent work restrictions by his physician. *Id.* These restrictions limited his lifting and bending functions, which ultimately precluded him from continuing in the Lineman position. *Id.* Thereafter, Plaintiff alternated between extended absences and light duty work assignments until November, 1999. *Id.* at 47-51, 61.

During the period from March through November, 1999, and thereafter, a representative from the Workers' Compensation Department at GPC made efforts to find alternate positions for Plaintiff and identified a number of opportunities for him. *Id.* at 63-64; White Dec. PP 5-13. One such opportunity was a temporary Cable Locator position, which Plaintiff accepted and occupied beginning on or about November 22, 1999. Edwards Dep., Vol. III, at 61-62. In that assignment, Plaintiff reported to James Weldon, Cable Locating Manager at GPC. Edwards Dep., Vol. I, at 28. Weldon apparently did not advertise the opening but accepted Plaintiff into the position based on White's recommendation. Weldon Dep. 54.

The duties of a Cable Locator generally include locating underground electrical cable at various locations within an assigned region to facilitate engineering, construction, and other types of projects and to avoid potential accidents or outages associated with such projects. Weldon Dec. P 2; Edwards Dep., Vol. II, at 332-33; Edwards Dep., Vol. III, at 158-60 & Exhibit 2. These duties require mapping skills, planning skills, teamwork, and the ability to work without direct supervision. Weldon Dec. P 2; Edwards Dep., Vol. II, at 332-33; Edwards Dep., Vol. III, at 56-59 & Exhibit 2.

Plaintiff's temporary Cable Locator assignment ended on or about April 29, 2000. Edwards Dep., Vol. I, at 18; Edwards Dep., Vol. III, at 61-62. He has been receiving a combination of workers' compensation benefits and long term disability insurance benefits totaling approximately $2,170.00 per month since the end of his assignment in April, 2000. Edwards Dep., Vol. III, at 170-71.

Plaintiff applied for a regular (non-temporary) Cable Locator position in late March or early April, 2000. Complaint P 88; Weldon Dec. PP 5-6. The record reveals the following concerning the selection process. The hiring manager for this position was James Weldon, who at the time was Plaintiff's supervisor in the temporary Cable Locator assignment. Weldon Dep. at 53; Weldon Dec. P 5. Weldon testified that 35-40% of the individuals he has hired to fill the Cable Locator position are black. Weldon Dep. 18. Weldon prepared a listing of Cable Locator job duties. He, in conjunction with GPC's human resources department, prepared a job announcement which was posted on GPC's JobNet system. Numerous employees applied. Of those who applied, Weldon chose seven individuals for interviews. Plaintiff Edwards was one of those selected. Weldon had become Edwards' manager on November 22, 1999. However, Weldon did not have day-to-day contact with Plaintiff, as the Cable Locator job is by its nature a field position; also, Plaintiff was working out of GPC's Gibbs Road location. Weldon had never given Plaintiff an evaluation.

As the hiring manager for the Cable Locator position, Weldon put together the committee which would interview the applicants. He selected Phyllis Austin, a Senior Region Support Representative (white female) who worked at the Gibbs Road location which was Plaintiff's home base. He

also selected Tyre Hester, an Engineering Associate I (white male), and Terry Smith, a Cable Locator (black male).

Prior to the interview date, candidate profiles were prepared for each of those applicants who were to be interviewed. The candidate profile is a form which provides information such as hire date, current job, and other identifying data. It lists the full employment history of the applicant, as well as the incompany self-improvement courses taken by the applicant. Presumably, each of the interviewers was furnished with the candidate profile before the interview.

Human Resources Representative Danielle James observed the interviews. James Dec. P 3. Before the interviews, Ms. James advised the selection committee about the mechanics of the selection process and instructed the committee members that the candidates' race and other impermissible factors were not to be considered during the selection process. *Id.* The committee ultimately selected one candidate, Carey Rutledge, for this position. Weldon Dec. PP 9, 12.

Each applicant was interviewed individually. The interview was based on questions contained in a structured interview questionnaire, which had been prepared by Defendants' human resources department. Each interviewer had a copy of the questionnaire. The first question was, "Please tell me about your background and experience for this position." The final question was, "Why do you want this job?" The remaining six questions addressed various attributes deemed important to the job – initiative, customer focus, communication, and safety. All were open-ended questions. For example, one of the "initiative"

questions was, "Sometimes daily emergencies keep us from getting our most important work done. What are some ways you have found to stay on track and meet scheduled deadlines?" The "customer focus" question was, "Describe what 'meeting the needs of the customer' means to you. Tell me about a time when you met the needs of a customer." The structured interview questionnaire contained spaces for each interviewer to score the applicant's response to questions 2 through 7, the low score for each answer being 0 and the top score being 3. Each of the interviewers made notes in spaces provided on the questionnaire, presumably while the applicant was talking, during the respective interviews. The forms pertaining to Plaintiff are in the record. *See* Weldon Dep. Exhs. 7-11. The record does not clarify exactly when the interviewers scored the responses – whether at the conclusion of each interview, or at a later time.

The Court notes that Plaintiff has not questioned the job-relatedness of the questions asked during the interview.

Following the interviews, the four committee members were asked to place the seven applicants in rank order from 1 to 7 (1 being the top ranked applicant) based on "gut feel" only. According to the interview scoring summary, this is an optional step in the process. Weldon, Hester and Smith ranked Plaintiff as a "1". Smith also gave a "1" ranking to applicant Jim Brown. Ms. Austin ranked Edwards as "4".

Applicant Jim Brown (white male) received rankings of 3, 1, 2 and 1, putting him in second place (if the number of "1" ratings is controlling) or tied for first place (if the aggregate rankings are deemed most relevant: Plaintiff 1

+ 4 + 1 + 1 = 7; Brown 3 + 1 + 2 + 1 = 7). Cary Rutledge, a white male applicant, was in next place with rankings of 2, 2, 3 and 5.

The record does not clarify at what point the interviewers' scores of the answers to the structured questions were tallied. The tally was done by the facilitator, Danielle James, based on the scores reflected in the structured interview questionnaire. With 3 being the maximum points awardable for each answer, and with four individuals scoring each answer, the maximum points awardable for a particular answer to a question was 12. Tallies were done for all seven of the applicants who were interviewed. The scores ranged from 69 points for Jim Brown, to a low of 55 points. Edwards' point count was 61 and the point count for Carey Rutledge was 62.5.

The committee discussed the merits or demerits of each of the top 3 applicants – Brown, Plaintiff, and Rutledge. It is undisputed that at this point, Ms. Austin stated that she had often seen Plaintiff on the phone and visiting with other employees, whereas the other Cable Locators were in the office only briefly at the beginning and ending of the workday. *See* Austin Dec. P 6. Plaintiff's knowledge of the job and ability to do the job was not questioned. Weldon stated that prior to the committee interviews he had the feeling that Plaintiff probably would be the top applicant for the position. Weldon Dep. 33, 98.

Committee member Smith opined that Plaintiff was the top-qualified applicant because he had held the same position in a temporary capacity; thus, his knowledge of the job was superior. At some point, the committee's facilitator Danielle James made negative comments about Plaintiff's behavior during the interview. Smith objected,

apparently appropriately, that Ms. James' expression of views was not appropriate.

The committee then discussed the fact that during his interview candidate Brown had said that the trip to Atlanta for the interview had taken longer than he had expected, and that plus his back injury made him think he might not take the job if it was offered to him. The committee therefore determined – apparently by mutual consensus – that the job would not be offered to Brown based on his expression of disinterest but rather should be offered to Rutledge, who the committee by consensus deemed to be the top applicant.

Weldon accepted the committee's recommendation. As the hiring manager for the position he had the discretion to reject the committee's recommendation, but he testified that his customary practice was to accept it. He could not recall an instance when he had not accepted a committee recommendation. Weldon Dep. 41.

Plaintiff does not provide evidence countering the claim of low productivity or frequent absences which according to Defendant constituted 20% of Edwards' work days while he was being supervised by Weldon. He does point out, with no dispute by Defendants, that all absences were excused on account of doctors' appointments or vacation time. Edwards also offers the declaration of Tensley Usher, a Cable Locator, who opines that Cable Locators have frequent need to use the telephone, that he worked with Plaintiff during the time in question and that in his opinion, Plaintiff was a productive employee.

Plaintiff applied for a number of other job postings through Defendants' internal job posting and application system, JobNet. Edwards Dep., Vol. II, at 319-20; Edwards

Dep., Vol. III, at 80-81, 109-10. In one of his depositions, Plaintiff testified that there are twelve job types, in addition to the Cable Locator position discussed above, that he contends are at issue in this case. Edwards Dep., Vol. III, at 91-92 & Exhibit 1. These job types are as follows: Power Delivery Specialist; Construction Safety Coordinator; Distribution Supervisor; Operator I; Drafter; Operating Associate I; Operation Services Representative; Service Coordinator; Shift Team Leader; Support Representative; Customer Service Representative; and Lighting Coordinator. *Id.* In his response to Defendants' motion for summary judgment, Plaintiff asserted that he was also denied a Power Delivery Supervisor position because of his race.

On July 21, 2000, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ["EEOC"] alleging that he had been subjected to discrimination based on his race. Edwards Dep., Vol. I, at 192; Edwards Dep., Vol. II, at 217-19. Plaintiff then requested and received a Dismissal and Notice of Rights on July 27, 2000, the same day the instant lawsuit was filed. Edwards Dep., Vol. II, at 217.

II. Defendants' Summary Judgment Motion

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in its motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's

case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[2] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on the parties, the Court will address them separately.

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[2] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group. Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County. Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a prima facie case using circumstantial evidence, a plaintiff may use the test established in *McDonnell Douglas*.[3] A plaintiff may establish a prima facie case by demonstrating 1) that he belongs to a protected class under Title VII; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment

[3] The *McDonnell Douglas* standard for a prima facie case also is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America. Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*,

939 F.2d at 952 (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Disparate Treatment

In their motion, Defendants apparently do not argue that Plaintiff has failed to establish a prima facie case. Instead, Defendants assert that they have offered legitimate non-discriminatory reasons to rebut any presumption of discrimination in the decisions not to hire or promote Plaintiff. Defendants argue that summary judgment is appropriate because Plaintiff has failed to provide sufficient evidence to establish that these reasons are pretextual. In response, Plaintiff points to facts in the record which he contends raise genuine issues of material fact precluding summary judgment.[4] It is therefore necessary to determine whether Plaintiff has provided sufficient evidence to raise a genuine issue of material fact with respect to pretext for any of the positions.

Cable Locator

Job Requisition Number 010279

Defendants assert two reasons for their decision not to hire Plaintiff for this position: that Plaintiff did not perform as well in the interview as the successful candidate and that Plaintiff's performance in the temporary Cable

[4] Plaintiff alleges that he was discriminated against with respect to multiple openings in fourteen positions. Plaintiff now argues that Defendants' asserted legitimate, non-discriminatory reasons should not be considered because Defendants included them in an appendix to their motion rather than within the text of the motion itself. The Court rejects this argument.

Locator position was subpar. Plaintiff argues that he can establish pretext by showing that he was more qualified than the successful candidate and that Defendants' proffered reasons for the hiring decision are false.

While hiring a less qualified person is probative of discriminatory motivation, "a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race." *Alexander*, 207 F.3d at 1339-40. Thus Plaintiff "must adduce evidence that the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." *Cofield v. Goldkist*, 267 F.3d 1264, 1268 (11th Cir. 2001) (internal quotation and citations omitted). While Plaintiff provided evidence from which a reasonable jury could find that he had more technical skills and experience than the successful candidate, the alleged disparity in qualifications is insufficient to establish by itself that the decision to hire the successful candidate was motivated by race.

Nor is Plaintiff's other evidence sufficient to raise a genuine issue as to pretext. Plaintiff claims that he can show that Defendants' asserted legitimate non-discriminatory reasons for the decision not to hire Plaintiff are false. Defendants' first reason is that the successful candidate performed better than Plaintiff in the interview. Weldon testified that "while the panel recognized that [Plaintiff] had experience, some members of the panel observed that [Plaintiff] displayed an overly casual approach to the interview process. He seemed to believe he should automatically get the job just because he was temporarily performing a Cable Locator assignment." Weldon Dec. P 11. Austin

testified that she and other members of the panel "believed [Plaintiff] displayed presumptuous behavior during the interview. He acted as though he was interviewing the panel as to why he should take the job rather than showing the panel that he should be selected for the position. . . . His overall demeanor struck me as inappropriate for the situation." Austin Dec. P 8.

Plaintiff argues that the following facts, which are undisputed, create a genuine issue as to pretext precluding summary judgment: that the only black member of the selection panel disagreed with negative comments made about Plaintiff's interview performance (Smith Dec. P 5); that three out of the four panel members rated Plaintiff as the top candidate immediately after the interviews were completed (Weldon Dep. 98-99); and that a panel member's interview notes indicated that Plaintiff performed well during the interview and that Plaintiff's performance was very close to that of the person hired (*Id.* at 99, 103).

While this evidence is arguably sufficient to establish that the panel disagreed about Plaintiff's interview performance, Plaintiff has failed to establish pretext with respect to Defendants' second asserted reason for the decision not to hire Plaintiff: that Plaintiff's performance in the temporary cable locating position was subpar. Plaintiff's supervisor testified that "the amount of work [Plaintiff] completed in the temporary Cable Locator position was low as compared to other Cable Locators." Weldon Dec. P 4. According to Defendants, one of the panel members reported during the selection process that she had often seen Plaintiff on the phone and visiting with other employees while other Cable Locators were in the office only briefly at the beginning and ending of the work day.

> Although other Cable Locators typically were in the office only briefly a couple of times during the day to pick up their work assignments, [Plaintiff] seemed to be in the office much more frequently and for longer periods of time than other Cable Locators. I observed [Plaintiff] spending work time talking on the telephone and visiting with other employees.
>
> [Plaintiff] was also absent from work on a regular basis, sometimes without advanced notice. These frequent absences made it even more important to use his time at work productively. My impression was that [Plaintiff] did not seem to be trying very hard to succeed at the Cable Locator job. He did not seem motivated to get the work done efficiently even though there were many work orders for Cable Locators. My impression was confirmed when I heard complaints from other Cable Locators that [Plaintiff] was not getting his work done, and that they had to pick up part of his workload.
>
> I shared this information with the interview panel during our discussion of [Plaintiff's] suitability for the Cable Locator position. While [Plaintiff] had experience as a Cable Locator, I believed it was important for the Committee to know about [Plaintiff's] poor work habits. I felt this information was relevant to the decision.

Austin Dec. PP 5-7; *see also* Weldon Dec. P 10.

Plaintiff argues that the following evidence creates genuine issues of material fact as to whether these reasons are a pretext for discrimination. First, Plaintiff points to evidence that Plaintiff's supervisor considered him one of the best qualified for the position at issue before the interview and had a "gut instinct" that Plaintiff was the

top applicant for the position. Weldon Dep. at 33, 98. Plaintiff challenges Defendants' assertion of low productivity with the testimony of another Cable Locator that the position requires extensive telephone use and that Plaintiff generally performed his job well and did not overuse the telephone. Usher Dec. PP 7-10.

The proper pretext analysis is whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation mark and citations omitted). Defendants are certainly entitled to employ subjective criteria such as an interviewer's response to an applicant or co-workers' observations about an applicant's work habits their in hiring process. *Murphy v. Yellow Freight System. Inc.*, 832 F. Supp. 1543, 1548 (N.D.Ga. 1993) ("The use of subjective factors in making employment decisions cannot be sufficient to support a finding of discrimination."). Plaintiff contends that the subjective reasons asserted are not credible based on evidence in the record. However, Plaintiff has not come forward with any evidence to establish that the decisionmakers with respect to this position did not find that Plaintiff's absences and low productivity made him a less attractive candidate. Plaintiff's evidence is thus insufficient to permit a reasonable factfinder to conclude that the reasons given by Defendants were a pretext for intentional discrimination.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' hiring and promotion practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support his claim that Defendants' hiring and

promotion practices had a discriminatory effect on black employees. Plaintiff argues that the reports of his expert, Dr. Madden, which find statistically significant disparities in the promotion of black employees relative to white employees, are evidence from which a reasonable fact-finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support his individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted

positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which he worked or the positions which he challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education, and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977) (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).[5]

[5] Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Because Plaintiff has failed to establish pretext with respect to all of Defendants' asserted reasons, Defendants are entitled to summary judgment with respect to this claim. *See Chapman v. A.I. Transport*, 229 F.3d 1012 (11th Cir. 2000); *Combs*, 106 F.3d at 1529.

Job Requisition Number 008603

Defendants assert that Plaintiff was not awarded a position at this opening because the opening was rescinded before being filled. Defendants cite to the declaration of Jim Weldon to support this position. While Weldon's declaration does not provide any evidence with respect to this opening, Weldon's deposition testimony confirms that the position was in fact rescinded. Weldon Dep. 71-72. Further, Plaintiff has failed to respond specifically to Defendants' motion for summary judgment with respect to this opening. Defendants are therefore entitled to summary judgment on this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's promotion claim.

Plaintiff's failure to specifically plead facts with respect to the remaining positions precludes Plaintiff's pursuit of claims related to such positions. *See Coon v. Georgia Pacific Co.*, 829 F.2d 1563, 1569 (11th Cir. 1987) (holding that district court did not err when it refused to allow plaintiff to proceed on individual discrimination claims not pleaded in her complaint). However, because Plaintiff did specify the following positions during discovery, the Court

will review Plaintiff's claims out of an abundance of caution.

Operator I (Job Requisition Number 010284)[6]

Defendants offer two legitimate, non-discriminatory reasons for the decision not to interview and thus not to hire Plaintiff for this position: that Plaintiff received a negative reference from his supervisor and that the successful candidates were believed to be the most qualified applicants for the position. Defendants' Motion for Summary Judgment, Exhibit A at 11; Johnson Dec. P 5; Lawrence Dec. P 5, Specifically, Defendants provided evidence that Plaintiff was not selected for an interview because Plaintiff's supervisor indicated to the hiring manager for this position that Plaintiff had recurring attendance problems. Lawrence Dec. P 5. Defendants also described the specific qualifications and experience the selection committee relied upon in determining that the successful candidates were best-qualified for the position. Johnson Dec. P 5.

To establish pretext, Plaintiff does not address the evidence that he received a negative reference but instead contends that the successful candidates were not qualified for the position. In support of his attempt to create a genuine issue of material fact as to whether these candidates were

[6] Plaintiff applied for several Operator I positions during the period in question. Defendants provided legitimate, nondiscriminatory reasons for each of these positions. *See* Defendants Motion for Summary Judgment, Exhibit A. Because Plaintiff provides arguments as to pretext for only one of these openings, the Court will consider only this opening in its analysis. Defendants' Motion for Summary Judgment is GRANTED as to the remaining Operator I positions.

qualified, Plaintiff relies upon job posting documents and performance evaluations of the successful candidates.[7] These performance evaluations indicate that the successful candidates received less than stellar reviews in some of the areas listed as job requirements in the relevant job posting.[8] However, that Defendants suggested improvement in the areas at issue – safety skills and ability to participate in a team environment – does not establish that Defendants did not believe that the successful candidates were qualified for the position. Plaintiff makes no attempt to indicate what Defendants considered the requisite level of skill in the areas at issue and thus

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[7] Defendants have filed a motion to strike this evidence, arguing that it is inadmissible because it is unauthenticated and constitutes inadmissible hearsay. However, this argument is unavailing because there is no requirement' that evidence be presented in admissible form as long as the evidence would be admissible at trial. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). The evidence at issue would likely be admissible at trial. *See, e.g.*, 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000) ("Authentication can also be accomplished through judicial admissions such as . . . production of items in response to . [a] discovery request."); F.R.E. 803(6) (hearsay exception for business record); F.R.E. 801(d)(2)(D) (admission by party opponent does not constitute hearsay); F.R.E. 806 (hearsay exception for purposes of impeachment).

[8] Defendants have filed a motion to strike this evidence, arguing that it is inadmissible because it is unauthenticated and constitutes inadmissible hearsay. However, this argument is unavailing because there is no requirement' that evidence be presented in admissible form as long as the evidence would be admissible at trial. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). The evidence at issue would likely be admissible at trial. *See, e.g.*, 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000) ("Authentication can also be accomplished through judicial admissions such as . . . production of items in response to [a] discovery request."); F.R.E. 803(6) (hearsay exception for business record); F.R.E. 801(d)(2)(D) (admission by party opponent does not constitute hearsay); F.R.E. 806 (hearsay exception for purposes of impeachment).

cannot establish that the successful candidates did not meet Defendants' requirements.

Because Plaintiff has failed to come forward with evidence from which a reasonable jury could determine that Defendants' reasons are pretext for discrimination, Defendants' motion for summary judgment is GRANTED with respect to this position.

Operator II (Job Requisition Number 008845)[9]

Defendants offer the following reason for the decision not to hire Plaintiff for this position: that the successful candidates were believed to be more qualified than Plaintiff and other applicants for the position. Defendants' evidence shows that the hiring manager narrowed the list of applicants by examining their resumes and job history profiles using the specific criteria set out for this position and by conducting informal surveys of people who knew or had worked with individual applicants. The hiring manager considered the following job-related factors in determining which applicants to interview: previous positions held, training completed, educational achievements, and previous job performance. Plaintiff was not selected for an interview. Defendants contend that the hiring committee made a consensus recommendation to hire the successful candidates based on their relevant experience, demonstrated

[9] Plaintiff applied for several Operator II positions during the period in question. Defendants provided legitimate, nondiscriminatory reasons for each of these positions. *See* Defendants' Motion for Summary Judgment, Exhibit A. Because Plaintiff provides arguments as to pretext for only one of these openings, the Court will consider only this opening in its analysis. Defendants' Motion for Summary Judgment is GRANTED as to the remaining Operator II positions.

understanding of position requirements, and demonstrated ability to handle the demands of the job.

Plaintiff now asserts that he can show pretext by demonstrating that one of the successful candidates was not qualified for the position. Plaintiff argues that this candidate did not have the knowledge of power systems operations and basic electrical theory stated as a qualification in the job posting, relying on a post-hiring development plan for this candidate suggesting that the candidate attend a seminar on basic electricity.[10] Again, however, Plaintiff fails to provide any evidence with respect to how much weight Defendants placed on this job skill. That Defendants suggested additional training for the successful candidate does not establish that Defendants did not believe that the successful candidate was qualified for this position.

Plaintiff has therefore failed to provide evidence establishing a genuine issue of material fact as to pretext. Accordingly, Defendants' motion for summary judgment with respect to this position is GRANTED.

Power Delivery Specialist (Job Requisition Number 007486)

Plaintiff first identified this position as one in which he was discriminated against in his response to Defendants'

[10] Plaintiff also appears to argue that he was more qualified than this candidate, asserting that his Lineman position required more knowledge and exposure to electrical systems than the successful candidate's Mechanic position. However, Plaintiff fails to point to any evidence in the record to support this argument. Plaintiff's own evaluation of whether his experience made him more qualified than the successful candidate is insufficient to establish pretext precluding summary judgment.

motion for summary judgment. Because Plaintiff asserts that he has both direct and circumstantial evidence of discrimination with respect to this position, the Court will first address whether Plaintiff has presented evidence sufficient to state a prima facie case.

In this case, Plaintiff asserts as direct evidence of discrimination that the alleged decisionmakers for this position permitted nooses to be hung in their facilities for years, including when this opening was being filled, and that these decisionmakers shredded evidence related to the hiring process for this position. To support these claims, Plaintiff offers the deposition testimony of Defendants' employees that they had seen the nooses but had not taken action to have them removed and that they had shredded documents in the course of preparing documents for production in this case.

This testimony does not constitute direct evidence of discrimination. To make a prima facie case using direct evidence, Plaintiff must come forward with evidence that, if believed, proves the existence of discrimination without inference or presumption. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). "Direct evidence is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." *Id.* (internal quotations and citation omitted). However, if the alleged conduct "at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." *Id.* That these witnesses saw the nooses but did nothing about them does not constitute direct evidence of discrimination because it does not clearly establish the decisionmakers' intent to discriminate. Rather, this evidence requires an inference that because these men did not take action to remove the

nooses, they maintained a racial animus and another inference that such animus affected the decision not to hire Plaintiff. Nor does Plaintiff's evidence of document shredding constitute direct evidence of discrimination. Instead, it requires an inference that these workers shredded the documents to conceal that the decision not to hire Plaintiff was based on his race.

However, Plaintiff may be able to state a prima facie case of discrimination through the use of circumstantial evidence. Plaintiff can clearly establish that he belongs to a protected class, that he applied for the job, that he was rejected and that others who were not members of the protected class were promoted. *See Denney*, 247 F.3d at 1183. There is some question as to whether Plaintiff was qualified for the position. While Plaintiff contends that he meets some of the articulated qualifications for the position, Defendants produced undisputed evidence that Plaintiff's application lacked the repair shop and mechanical experience required for the position, suggesting that Plaintiff was not qualified for the position.

In any case, Defendants have come forward with a legitimate, non-discriminatory reason – that the successful candidate was the most qualified applicant for the position – sufficient to overcome any presumption of discrimination.[11] Defendants contend that the hiring manager considered the following factors in determining which

[11] Plaintiff argues that the Court should not consider Defendants' asserted non-discriminatory reason because it was asserted for the first time in Defendants' reply brief. The Court rejects this argument in light of the fact that Plaintiff asserted facts with respect to this position for this first time in Plaintiff's Response to Defendants' Motion for Summary Judgment.

applicants to interview: whether the candidate had multiple years of experience as a journeyman, whether the candidate was familiar with the major functions of the repair shop, and whether the candidate was technically proficient in his own job. The hiring manager indicated that the position required extensive repair shop and mechanical experience because it was a supervisory position. Defendants assert that Plaintiff was not selected for an interview because his application reflected neither familiarity with the repair shop nor a mechanical background and because his Lineman position did not involve repair shop or mechanical experience.

Plaintiff contends that he can establish pretext by showing that the successful candidate was less qualified than he was. However, plaintiff does not provide any specific evidence with respect to either his or the successful candidate's qualifications for this position. Plaintiff's own evaluation of his qualifications does not support a finding of pretext. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1332-33 (11th Cir. 1998).

Nor can Plaintiff establish pretext with his evidence that some of the alleged decisionmakers were aware of the nooses but did not take action to remove them. Statements or conduct showing a supervisor's racial animus toward the plaintiff may be significant evidence of pretext, once the plaintiff has set out a prima facie case. *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1313 (11th Cir. 1998) (citing *Smith v. Horner*, 839 F.2d 1530, 1536-37 (11th Cir. 1988)), mod'd in part on other grounds, 151 F.3d 1321. Plaintiff's allegations suggest that these employees tolerated discriminatory conduct; however, such evidence is insufficient to establish pretext. To establish pretext, Plaintiff must show not only that racial animus existed

but that such animus tainted the ultimate decisionmaker's action. *See, e.g., Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1248 (11th Cir. 1998). Plaintiff must therefore prove that such discriminatory animus was an actual cause of the decision not to hire Plaintiff. *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999). Plaintiff has failed to point to any evidence that either Sanders or Davis was involved in the decision not to hire Plaintiff for the position at issue or that Cawthorne, the hiring manager who made the decision not to interview Plaintiff, had knowledge of the nooses.

Plaintiff has presented evidence that Bagwell, his direct supervisor at one point, was aware of the nooses. Bagwell was responsible for Plaintiff's performance evaluations, which were considered by Cawthorne in the employment decision. However, Bagwell's evaluation was overwhelmingly positive. Further, Plaintiff does not argue, nor does the evidence suggest, that Cawthorne relied solely on Bagwell's evaluation in making the decision not to interview Plaintiff. Thus, Plaintiff cannot use this evidence to establish pretext. Cf. *Llampallas*, 163 F.3d at 1248 (holding that Plaintiff may establish pretext by showing that decisionmaker merely rubberstamped discriminatory recommendation without conducting his own investigation of the facts surrounding Plaintiff's employment); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir. 2001) (holding that where decisionmaker conducts his own investigation and makes an independent decision, his decision is free of the taint of a biased subordinate employee); *Bessemer Carraway*, 151 F.3d 1321 (holding that supervisor's racially motivated statements were insufficient to support prima facie case where decisionmaker did not rely solely on supervisor's

reports of plaintiff's misconduct but made independent investigation).

Similarly, Plaintiff's evidence of document shredding does not support a finding of pretext. "In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). The Court has already determined that there was no evidence of bad faith. *Cooper v. Southern Co.*, No. 00-2231 (N.D.Ga. Feb. 5, 2001).

Because Plaintiff has failed to provide evidence sufficient to support a finding of pretext, Defendants' motion for summary judgment is GRANTED with respect to this position.

Operating Services Representative (Job Requisition Numbers 008344 and 008352)[12]

Defendants assert the following reason for the decision not to hire Plaintiff for these openings: that the successful candidates were believed to be more qualified than Plaintiff and other applicants. Defendants provide evidence to establish that the selection process was fair and that race was not considered in the employment decision and thus met the burden of producing a legitimate, non-discriminatory

[12] Plaintiff applied for multiple Operating Services Representative positions during the period in question. Defendants provided legitimate, non-discriminatory reasons for each of these positions. *See* Defendants' Motion for Summary Judgment, Exhibit A. Because Plaintiff provides pretext arguments for the June, 1999, openings only, the Court will consider only these openings in its analysis. Defendants' Motion for Summary Judgment is GRANTED as to the remaining Operating Services Representative position.

reason sufficient to overcome the presumption of discrimination. Plaintiff's assertions that he was qualified for the position and that the successful candidate lacked computer skills may be construed as an attempt to establish that Defendants' asserted reason for the decision was pretextual. However, Plaintiff has failed to point to any evidence establishing that computer skills were required for this position. Thus, Plaintiff's evidence that a development plan for the successful candidate suggested computer training is not sufficient to support a finding that Defendants did not believe that this candidate was qualified for the position. Therefore, Defendants' motion for summary judgment is GRANTED with respect to this position.

Shift Team Leader

In their motion for summary judgment, Defendants state that the Shift Team Leader position is one in which Plaintiff alleges he was discriminated against. While Defendants have moved for summary judgment with respect to all of Plaintiff's claims, Defendants have not asserted a non-discriminatory reason for any employment decision involving Plaintiff nor have they pointed to any evidence with respect to this position. However, Plaintiff does not address this deficiency is [sic] his response to Defendants' motion, suggesting that this position is no longer at issue. Plaintiff is therefore deemed to have abandoned his claim with respect to this position and Defendants are entitled to summary judgment.

Remaining Positions

Upon review of the record, the Court finds that Defendants have asserted legitimate, non-discriminatory reasons for the decisions not to hire Plaintiff for any of the remaining positions in which Plaintiff asserts Defendants discriminated against him.[13] Plaintiff has made no attempt to point to any specific evidence suggesting pretext as to any of these decisions. In his attempt to avoid summary judgment on these claims, Plaintiff instead argues that he can prove disparate treatment with statistical evidence of discrimination. However, as discussed above, the statistical evidence provided by Plaintiff is insufficient in the absence of any other evidence to support a finding of pretext with respect to any of Plaintiff's claims. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to these claims.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value,

[13] Construction Safety Coordinator; Distribution Supervisor; Drafter; Service Coordinator; Shift Team Leader; Support Representative; Customer Service Representative; and Lighting Coordinator.

statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support his argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75. Accordingly, the Defendants' motion for summary judgment with respect to Plaintiff's pattern or practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To

establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; *In re: Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim. Plaintiff argues in response that his statistical evidence is sufficient to create a genuine issue of material fact precluding summary judgment.

As evidence of a facially neutral policy, Plaintiff points to Defendants' use of subjective criteria in determining which applicants to interview and thus which applicants to hire. While Plaintiff has failed to identify in his response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on him, Plaintiff provided evidence in his motion for class certification to support his claim that Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, showing that Plaintiff was subject to subjective policies does establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient

to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that the use of subjective hiring criteria caused a statistically [sic] disparity within the promotions for which he applied.

To establish the first element of a disparate impact claim, Plaintiff relies on his expert's report which finds statistically significant disparities in the promotion of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Alabama*, 198 F.3d at 1312. Plaintiff's expert reports an over-all statistical disparity between black and white employees in hiring and promotion by Defendants. However, Plaintiff's statistics – which compare promotions among employees within the same pay grade who perform similar job functions – fail to distinguish between positions in which Defendants' decisionmakers applied the express objective hiring factors and those in which the decisionmakers employed subjective criteria. Further, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to promotions. Plaintiff's evidence also fails to compare outcomes for those employees who actually applied for posted positions. Nor does Plaintiff's evidence distinguish between competitive and

non-competitive promotions; such deficiency further undermines the probative value of Plaintiff's statistics with respect to promotions. *See Forehand v. Florida State Hospital at Chattahoochee*, 89 F.3d 1562, 1572-73 (11th Cir. 1996).

Because of these deficiencies, Plaintiff cannot establish the existence of a causal nexus between a specific, facially neutral employment practice and a statistically significant disparity. *See, e.g., Joe's Stone Crab*, 220 F.3d at 1279. In *Joe's Stone Crab*, the Eleventh Circuit found that the EEOC failed to establish a disparate impact claim where the EEOC presented no evidence that the employer's use of subjective criteria caused minority applicants not to apply or that minority applicants for positions at issue were disadvantaged by the subjective criteria. Similarly, in this case Plaintiff fails to point to any evidence linking Defendants' use of subjective criteria to the alleged statistical disparity. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is granted. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

So ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-88

In the

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 199a to 415a

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1: 00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1334; 2003 U.S. Dist. LEXIS 5723

March 31, 2003, Filed

OINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Carolyn Wilson. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless indicated otherwise. Plaintiff was hired by Defendant Georgia Power Company ("GPC") in 1985. Third Am. Comp. at P 118. She held various positions within that organization through

approximately December 1997. *Id.* In late 1997, Plaintiff applied for a position with Defendant Southern Company Energy Solutions, Inc. ("SCES").[1] *Id.* at 121. SCES is

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[1] Defendants The Southern Company ("TSC"] and Southern Company Services, Inc. ["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCS. Defendant GPC moves for summary judgment on the grounds that Plaintiff's employment with GPC ended prior to the relevant time period. Plaintiff has failed to respond to GPC's motion and is deemed to have abandoned her claim against GPC. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits. Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is *an* "individual[ ] who receives compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC and SCS only if it can be shown that TSC and SCS constituted "employers" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's involvement in personnel policy-making and employee selection processes to maintain "substantial involvement" in SCES's personnel decisions. Pla. Resp. to Def. Hot. for S. J. at 34. Plaintiff alleges that Defendants have submitted the declarations of SCS employees who claim involvement in the selection processes at issue in this case. However, with respect to the evidence offered in support of Defendants' motion for summary judgment, only declarant Anthony Roberts is an SCS employee and his testimony is completely unrelated to any employment decision affecting Plaintiff.

(Continued on following page)

non-utility subsidiary of TSC which develops and sells unregulated, competitive energy-related products and services.

In July 2000, SCES had operations in Georgia, Alabama, Florida and Mississippi. During this time, SCES had six separate business units: Energy Services, the Finance Center, Good Cents, PowerCall Security, Premier Home, and Technical Consulting Services. According to Defendants, each of the SCES units performs very different functions. For example, the Energy Services unit assists large commercial, federal, and industrial customers with reducing energy costs and solving power quality problems. The PowerCall Security unit is responsible for selling and monitoring residential and commercial security and fire alarm systems. The Premier Home unit offers cable television, internet access, long distance telephone, electric and water sub-metering and billing services for multi-family sites. The Finance Center unit is or was responsible for handling transactions such as loan originations and consumer loan sales for commercial customers and employees.

The position for which Plaintiff applied in late 1997 was within SCES's Finance Center unit. The job posting for this position noted that it would be filled within a pay grade range of exempt two through exempt five; according to Defendants, the pay grade depended on the incumbent's experience and education. Karla Fuller, the hiring manager,

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Plaintiff has failed to point to facts sufficient to support her argument that TSC or SCS is liable for any discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCS and GPC.

was involved in writing the job description for the position and deciding on the possible pay grade range to be listed on the job posting. Defendants contend that Fuller did not assign a job title to the position within SHIPS, Defendants' employee database, but left the assignment of the SHIPS job title to the Human Resources Department. According to Fuller, the descriptive job title for the position was Finance Center Supervisor.

In December 1997, Plaintiff was offered and accepted this position. The offer letter stated that the position was being filled was "Project Analyst Senior"[2] at exempt level two. While she accepted the job in late December 1997, Plaintiff did not begin working at SCES in the Finance Center until February 1998. In her position in the Finance Center, Plaintiff reported to the Finance Center Manager and initially was responsible for handling the origination of consumer loans for commercial customers, establishing employee loans, entering those loan records in the company's personnel database and coaching and training Finance Center staff. Later, as the Finance Center changed and evolved, Plaintiff's duties also changed. For example, when the Finance Center stopped originating loans, Plaintiff became responsible for facilitating the bad debt reported by SCES's loan purchaser, Fannie Mae. Plaintiff admits that her position within SCES is unique and that she is not aware of anyone else who performs a job similar to hers.

Although the letter Plaintiff received at the time she accepted the position indicated that the position's title was

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[2] Apparently, this is the SHIPS job title which corresponds to the descriptive title Finance Center Supervisor.

Project Analyst Senior, the SHIPS database actually listed the Finance Center Supervisor position as Project Analyst III. Pla. Dep. II at 48. Plaintiff discovered this discrepancy sometime in 2000. *Id.* plaintiff acknowledges that after she learned the company's SHIPS database listed her as a Project Analyst III, her job responsibilities did not change and she continued to sign letters using her functional job title of Finance Center Supervisor.

In February 1998, when Plaintiff began her position as Finance Center Supervisor, she earned a monthly salary of $ 2,692, or $ 32,304 annually. In November 1998, Plaintiff received a 15.45% increase to $ 3,108 per month, or $ 37,296 annually. Five months later, in March 1999, Plaintiff received a 4% increase to $ 3,232 per month, or $ 38,784 annually. At that time, Plaintiff also received a $ 7,460 incentive award, which was a figure equal to 20% of her salary, and a "spot award" in December of $ 4,241.51. In February 2000, Plaintiff entered into an incentive agreement with SCES in which Plaintiff had an opportunity to receive sizable additional bonuses. In March 2000, Plaintiff received a 4% increase in salary to $ 3,361 per month, or $ 40,332 annually. At that time, Plaintiff also received a $ 7,758 incentive award, which was a figure equal to 20% of her salary.

Defendants contend that in order to set compensation ranges for its various employee positions, SCES typically conducts market tests of the positions to compare salary rates to those of other similar companies in similar industries. At SCES, the job title "Project Analyst" is a broad classification that encompasses numerous job descriptions. Thus, Defendants contend, in order to set specific compensation rates for a position, the actual job duties must be examined. According to Defendants, no action was taken

at the time Plaintiff moved into the Finance Center to compare her compensation with anyone else in SCES because the Finance Center Supervisor position was not like any other position that existed anywhere else in the Company.

In November of 1999, Plaintiff applied for a Business Analyst II position with SCES. Karla Fuller was the hiring manager for this position and the successful candidate was to report to Fuller. This position involved managing working capital requirements of the Energy Services unit, monitoring working capital forecasts, assisting project managers with progress payment requests, account reconciliation, monitoring of invoicing of customers, and managing accounts receivable. According to Defendants, the preferred qualifications for the position were a bachelors degree in finance, management, or accounting; experience with the Excel spreadsheet program; experience in the construction industry; and good oral and written communication skills. Even though Plaintiff did not possess all of these qualifications, Fuller selected Plaintiff for an interview because Fuller was familiar with Plaintiff's job skills and experience. Defendants contend that Fuller wanted to hire an individual who could move into the position with little or no training.

Fuller evaluated Plaintiff as performing well during the interview. Fuller believed that another candidate, Sarah McFall, also performed well during the interview. The position was awarded to McFall. Defendants contend that McFall was awarded the position because, unlike Plaintiff, McFall had a bachelor's degree in accounting, had relevant specialized experience in construction accounting, and because Fuller believed that McFall was

better prepared to move into the position with little or no training or supervision.

This lawsuit was filed on July 27, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against her by subjecting her to a hostile work environment, improperly denying her promotions, paying her less than her white co-workers, failing to perform performance evaluations for Plaintiff, demoting Plaintiff, and by employing promotion and compensation policies which had a discriminatory impact on black employees.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in its motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the Court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000)[3] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County. Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

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[3] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice

claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Individual Disparate Treatment

Hostile Work Environment

In the complaint, Plaintiff alleges her supervisor made racist comments. *See* Third Am. Comp. P 119. In their motion for summary judgment, Defendants argue that Plaintiff cannot make a prima facie case of hostile work environment because she cannot show that the alleged conduct occurred during the relevant period. Plaintiff does not respond to this argument and thus is deemed to have abandoned this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

Promotion Discrimination

To establish a prima facie case for alleged failure to receive a promotion, Plaintiff must demonstrate that 1) she was a member of a protected class; 2) she applied and was generally qualified for the up-grade; 3) she did not receive the promotion; and 4) a similarly situated white employee received promotion over Plaintiff. *See, e.g., Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001). In the complaint, Plaintiff alleges that she was discriminated against with respect to two positions: Project Manager, for which she applied in 1997, and

Business Analyst, for which she applied in 1999. With respect to the 1997 Project Manager position, Defendants argue that Plaintiff's claim is untimely because the events associated with it fall outside the applicable statute of limitations. Plaintiff does not respond to this argument and therefore is deemed to have abandoned her claim with respect to this position.

With respect to the 1999 Business Analyst position, Defendants do not dispute that Plaintiff can establish a prima facie case but argue that Plaintiff cannot overcome Defendants' asserted non-discriminatory reason for the decision not to hire her for this position. Defendants contend that Plaintiff was not hired for this position because she did not possess all of the qualifications the hiring manager sought and that the successful candidate did possess these qualifications. Specifically, Defendants provided evidence that Karla Fuller, the hiring manager, sought an applicant with a bachelor's degree in finance, management, or accounting; Excel experience; construction industry experience; and good oral and written communication skills. Fuller Dec. P 4; Fuller Dep. at 114, 119, 121-22. Defendants also contend that Plaintiff was not hired for this position because Fuller believed that the successful candidate was better prepared to move into the position without extensive supervision or training. Fuller Dec. P 7.; Fuller Dep. 119, 121-22. These reasons constitute a legitimate, non-discriminatory reason for the decision not to hire Plaintiff for the position. *See, e.g., Denney*, 247 F.3d at 1183 (that successful candidate possessed the qualities that decisionmaker considered dispositive in choosing among the pool of qualified applicants constituted legitimate non-discriminatory reason); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir.